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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
Warden, et al.,

Respondent - Appellee.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
U.S.C.A. No. 04-55124
U.S.D.C. No. CV-02-00615-CAS

PETITION FOR WRIT OF CERTIORARI
Volume 1 of 2

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's frequent, unexpected, and debilitating manifestations of her mental disorder are extraordinary circumstances beyond her control such that equitable tolling of the one year statute of limitation imposed by the Antiterrorist Effective Death Penalty Act (AEDPA) should have been allowed by the district court?

LIST OF ALL PARTIES WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED PURSUANT TO SUP. CT. R. 14(B)

I. United States Court of Appeals for the Ninth Circuit
   (A) Denial of Petitioner's motion for reconsideration filed June 1, 2004
   (B) Denial of Petitioner's request for a certificate of appealability filed April 30, 2004

II. United States District Court, Central District of California, Western Division
Christina A. Snyder, United States District Judge
   (A) Order Denying Certificate of Appealability filed January 5, 2004
   (B) Judgement denying Petition and dismissing Petition with prejudice filed November 24, 2003, and entered November 25, 2003.
   (C) Order (1) Accepting and Adopting the Amended Report and Recommendation of the United States Magistrate Judge, and (2) Dismissing the Petition for Writ of Habeas Corpus filed November 24, 2003, and entered November 25, 2003.

III. United States District Court, Central District of California, Western Division
Victor B. Kenton, United States Magistrate Judge
   (A) Amended Report and Recommendation of United States Magistrate Judge filed October 17, 2003.

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No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
Warden, et al.,

Respondent - Appellee.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
U.S.C.A. No. 04-55124
U.S.D.C. No. CV-02-00615-CAS

PETITION FOR WRIT OF CERTIORARI

Petitioner, OMAIMA NELSON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 1, 2004, which ultimately affirmed the holding of the United States District Court, Central District of California, Western Division, which had denied Petitioner's request that due to her debilitating mental condition it caused an extraordinary circumstance that should have allow equitable tolling of the statute of limitations imposed by AEDPA.

OPINION BELOW

On June 1, 2004, Petitioner's motion for reconsideration was denied by the United States Court of Appeals for the Ninth Circuit. No opinion was expressed by the appellate court for the denial. This Petition for Writ of Certiorari is timely filed pursuant to Sup. Ct. R. 13.3.

Synopsis of United States District Court Magistrate's Amended Report and Recommendation

At the district court, the magistrate denied Ms. Nelson's petition as being untimely filed. See October 17, 2003, Amended Report and Recommendation of United States Magistrate Judge. See Appendix F. Further, the magistrate stated that there was no basis for equitable tolling of the statute of limitations. Appendix F10. The magistrate disagreed with the contention that Ms. Nelson was not sufficiently competent to assist in her filing by July 1, 1999. Appendix F19. The magistrate stated that the doctrine of "judicial estoppel" should be invoked claiming that Petitioner's counsel had taken inconsistent positions. Appendix F19. The magistrate quoted Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) which basically held that a court can preclude a party from changing positions over the course of the proceedings. Appendix F19. The magistrate stated that Petitioner's Counsel had "directly contradict[ed] earlier assertions that by mid-1998 Petitioner was sufficiently competent to assist" counsel by counsel having later asserted that "'[T]he Petitioner still exhibited significant signs of mental incompetency which interfered with the preparation of the Habeas Petition; . . . .'" Appendix F19.

The magistrate refused to consider any new evidence presented in Ms. Nelson's Objections to a Magistrate Judge's Report and Recommendation. Appendix F22. The magistrate contended that the district court was not required to hear evidence presented for the first time in a party's objections, but that it was in the district court's discretion to consider such evidence. Id. The magistrate's reasons were:

> A. Counsel had ample time to respond to issues prior to the magistrate issuing its Report and Recommendations as counsel received two extensions of time to reply to the Motion to Dismiss. Appendix F21.
>
> B. Ms. Nelson was represented by counsel since 1995 and "the conduct of Petitioner's counsel is inconsistent with the orderly administration of justice and proper regard for the dignity of judicial proceedings." Appendix F21.
>
> C. It was not simply that Ms. Nelson presented new evidence in her Objections but that the new evidence "contradicts and [was] inconsistent with the factual positions" taken by Ms. Nelson in her Response to the Motion to Dismiss, and Supporting Declarations, filed April 21, 2003. Appendix F21.
>
> D. Ms. Nelson has been represented by her present counsel for about 8 years in the post-judgment collateral review process and was not pro se as was Brown in Brown v. Roe, 279 F.3d 742 (9th Cir. 2002). Appendix F21-F22.
>
> E. Dr. Estner's Supplemental Declaration does not add credibility to Ms. Nelson's position but rather detracts from it because Dr. Estner has not seen Ms. Nelson since August of 1998 nor has he reviewed any of her records since that date. Appendix F22. Therefore, the magistrate

"[b]ased on the absolute lack of any evidence to support [his] conclusion, . . . accords no credibility to Dr. Estner's current assertion." Appendix F22.

F. The Doctrine of Equitable Tolling was inapplicable here as Ms. Nelslson's argument regarding "her ignorance of the law and lack of legal sophistication" was defeated by the fact that she had legal counsel. Appendix F23. Furthermore, such an argument does not constitute "'extraordinary circumstances' warranting equitable tolling." Id.

For these reasons the magistrate denied Ms. Nelson's habeas corpus as being filed untimely.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir 2002) (attorney miscalculation of due date did not trigger equitable tolling). Even in circumstances in which equitable tolling might otherwise be appropriate, the petitioner may not rely on the doctrine to excuse his or her own lack of diligence. See Guillory v. Roe, 329 F.3d 1015 (9th Cir 2003) (although district court erred in denying petitioner's motion to strike unexhausted portions of petition, petitioner was not entitled to equitable tolling because he waited for three years before attempting to exhaust

unexhausted claims).

The Ninth Circuit has held, in a case in which there was a genuine question about the petitioner's mental capacity, that the district court properly applied the doctrine of equitable tolling to toll the statute of limitations until a reasonable period after the court made its competency determination. Calderon v. U.S. Dist. Court, 163 F.3d 530, 542 (9th Cir 1998), overruled on other grounds in Woodford v. Garceau, 538 U.S. 202, 123 S.Ct 1398, 155 L.Ed.2d 363 (2003). See also Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir 2001) (district court erred in dismissing petition as untimely without giving petitioner adequate opportunity to develop facts when petitioner alleged facts supporting claims of equitable tolling and state-created impediment to filing).

"A criminal defendant may not be tried unless [sh]e is competent" Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) citing Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.*" Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) citing Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975) (emphasis added).

"The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances,

be sufficient." Drope v. Missouri, 420 U.S. 162, 180, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975). "In Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 4 L.Ed.2d 824 (1960) (per curiam), [this Court] held that the standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

"[This Court has] repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.' [citations omitted]. Nor is the significance of this right open to dispute. As Justice Kennedy recently emphasized: 'Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. [citations omitted]" Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)

"Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. See Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)." Cooper v. Oklahoma, 517 U.S. 348, 354 n.4, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)

Ms. Nelson's mental disorder interfered with her ability to assist her habeas corpus counsel and her mental disorder interfered with habeas corpus counsel's ability to fully exercise due diligence in

the preparation of her constitutional claims that are the basis of her habeas corpus petition. 28 U.S.C. §2244(d)(1); Laws v. Lamarque, 351 F.3d 919 (9th Cir. 2003). In addition, it is claimed that the district court narrowly applied the requirements of 28 U.S.C. §2244 by stating that

> "[i]t is only in 'rare instances' that, pursuant to §§2244 (d)(1)(B)-(D), 'the limitation period may run from a date later than the date on which judgment becomes final.' Baker v. State of California, 2000 WL 74071 at *1 (N.D. Cal. 2000). In the Motion to Dismiss, Respondent contends that the running of the limitations period in this case is governed by §2244(d)(1)(A). Petitioner, however, seeks a later start date based on §2244(d)(2)." October 17, 2003, Amended Report and Recommendation of United States Magistrate Judge, pages 10-11. See Appendix F9.

Ms. Nelson's mental disorder and the application of equitable tolling create questions of law as to the interpretation of 28 U.S.C. §§2244 and 2254 and its application to the denial of Ms. Nelson's petition for Writ of Habeas Corpus, and these questions of law should be reviewed *de novo* by this Court. Villafuerte v. Stewart, 111 F.3d 616, 622 (9th Cir. 1997); United States v. Miguel, 111 F.3d 666, 669 (9th Cir. 1997); United States v. Workinger, 90 F.3d 1409, 1412 (9th Cir. 1996); Laws v. LaMarque, 351 F.3d 919, 922 (9th Cir. 2003); Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); United States v. Battles, 362 F.3d 1195, 1196 (9th Cir. 2004).

STATEMENT OF THE CASE

Omaima Nelson suffers from a mental disorder that made her mentally incompetent at the time the offense was committed, at the time of her trial, and during the period of time her habeas corpus petition was being prepared. California Penal Code §1367(A). Ms. Nelson, by and through her counsel, Roger T. Nuttall, Nuttall & Coleman, referred to herein as "habeas corpus counsel," requests that the Order issued on April 30, 2004, be withdrawn and a rehearing granted. The United States Magistrate Judge did recognize a certain period of equitable tolling, but felt that there was not sufficient evidence to show equitable tolling should extended beyond July 1, 1998 to bar the one-year statute of limitations of §2244(d)(1).

Ms. Nelson's family was concerned about the final outcome of the trial and hired habeas corpus counsel to conduct an investigation, and to prepare the necessary legal documents in order to have her case reviewed. However, Ms. Nelson's mental disorder impaired the preparation of her habeas corpus claims. The amount of delay which Ms. Nelson's mental disorder caused in the preparation of her legitimate claims resulting in a tolling of the statute of limitations has been a disputed matter at the United States District Court level. Unless this Court recognizes that Ms. Nelson's mental disorder caused the delay in habeas corpus counsel's ability to fully exercise due diligence such that equitable tolling may protect her rights to pursue her legitimate constitutional claims, those legitimate claims will become barred by the passage of time as noted in 28 U.S.C. §2244(d)(1). Once habeas corpus counsel has been allowed, through equitable tolling, to be granted a certificate of appealability, counsel will be able to show that Ms. Nelson's trial

counsel failed to investigate, and to present to the jury, the full extent and nature of her mental disorder. Such failure on the part of trial counsel resulted in the ineffective assistance of counsel resulting in Ms. Nelson's inability to present evidence to show she was less culpable than defendants who are without such mental disorder. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) citing Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

There were other unexpected factors that contributed to the delay in the preparation of Ms. Nelson's habeas corpus claim. In addition to Ms. Nelson's frequent and unexpected lapses of lucidity related to her mental disorder, Ms. Nelson's forensic doctor was not granted timely access to examine her, and this delayed the preparation of medical evidence of her mental disorder. Further, among other things, Ms. Nelson was moved to another prison facility, without notifying counsel of her transfer, which caused Ms. Nelson's doctor to be required to resubmit the documentation necessary for admittance into that facility. All of these factors contributed to the delay in filing the habeas corpus claims and represent legitimate reasons for this Court to allow equitable tolling to protect Ms. Nelson's rights.

REASONS FOR GRANTING THE PETITION

Petitioner's mental condition was an extraordinary circumstance beyond her control that interfered with the preparation of her habeas corpus. Habeas corpus counsel requests that this Court allow a rehearing to review the following issues:

1) Ms. Nelson's frequent, unexpected, and debilitating manifestations of her mental disorder continued to provide

equitable tolling during the investigation and preparation of the "application for State post-conviction or other collateral review" (§2244(d)(2)) such that the "1-year period of limitations" (§2244(d)(1)) shall not apply. In the alternative, Ms. Nelson's frequent, unexpected, and debilitating manifestations of her mental disorder should allow the application of § 2244(d)(1)(D) in the consideration of how the manifestations of her mental disorder interfered with habeas corpus counsel's "exercise of due diligence."

There were several references to Ms. Nelson's sporadic periods of incapacity in counsel's Response to the State of California's Motion to Dismiss the Writ of Habeas Corpus filed April 21, 2003. See Appendix J. Below is a list, in chronological order, which should help this Court understand that Ms. Nelson mental condition was not stable post-judgment.

A. In the latter part of 1995, some four years after the homicide occurred, interviews with Ms. Nelson were "difficult due to [her] particularly disorganized mental state" and Ms. Nelson unable to "fully cooperate or communicate with her present counsel due to her then-existing level of psychosis". Appendix J3.

B. In early 1996, "present counsel continued to visit periodically with [Ms. Nelson] to see if her mental state has improved enough" so that she could assist habeas counsel by "relat[ing] her recollection of the circumstances of the case". Appendix J4. Apparently, Ms. Nelson was not always able to assist counsel due to her fluctuating mental states.

C. In late 1996, Ms. Nelson was lucid enough so that habeas counsel "was able to gather enough information from [Ms. Nelson] so as to be able to contrast what [she] was able to remember, and not remember, with the trial transcript" in

order to prepare the instant writ. Appendix J4.

D. Around December of 1996, Ms. Nelson "started to become more lucid"– which indicates that at some point she was less lucid – and was "able to talk somewhat more about her recollection" of how her trial case was handled. Appendix J6.

E. In September of 1997, Ms. Nelson was "starting to become much more lucid" which again indicates that at some point earlier she was less lucid. Appendix J7.

F On May 13, 1998, Ms. Nelson appeared to be "psychotically paranoid" when she "refused to be examined by Dr. Estner". Appendix J8. Apparently, Ms. Nelson condition deteriorated between September of 1997 and May 13, 1998 – a period of approximately eight months.

G. Although Ms. Nelson "cooperated fully with Dr. Estner" during his examination on May 21, 1998, this is not indicative that her condition improved; rather, it only shows that she was willing to be examined by Dr. Estner. Appendix J9.

H. Contrary to the Magistrate's assertion that "[i]t is reasonable to conclude, therefore, that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of he habeas petition" (Appendix F18), there is no indication that Ms. Nelson's condition was lucid and stable by July 1, 1998. In fact Ms. Nelson's condition was not observed by Dr. Estner (nor habeas counsel?) between May 21, 1998, and August 27, 1998, when he "examined [her] for a second time". Appendix F19 and H5. Therefore, there is no basis to believe that Ms. Nelson was capable of assisting habeas counsel by July 1, 1998.

I. Ms. Nelson "lacked the mental capacity to reason or assist habeas counsel in her defense". Appendix J14. After her conviction, she received "psychiatric treatment" which "improved her mental condition enough to assist in her defense", but the improvement in her mental condition was sporadic. Appendix J14. This improvement had "only occurred since late 1997" strongly indicating that Ms. Nelson's mental incapacity continued post-judgment. Id.

J. Ms. Nelson's fluctuating mental condition with intermittent periods of lucidity or insensibility, based upon medical records and expert opinions, has made it "clear... that [she] was incompetent to assist in her own defense, assist counsel in the preparation of a writ of habeas corpus, much less understand and undertake preparation of a Petition of Writ of Habeas Corpus". Appendix J17.

and

2) Since Ms. Nelson's trial counsel, on his own accord and without Ms. Nelson's consent, decided not to assert the complete defense of Not Guilty by Reason of Insanity even though the trial judge expressly recognized that there was expert opinion on the trial record to support the claim, Petitioner's fundamental rights were violated at that time. Petitioner's trial counsel did not make "reasonable investigatio[n]". Wiggins v. Smith, 539 U.S. 510, 522, 123 S.Ct. 2527; 156 L.Ed.2d 471 (2003). Ms. Nelson endured the horrific procedure of female genital mutilation at a very young age. The trauma of this procedure has had an life-long effect on her mental state. Due to Ms. Nelson's chaotic mental state, it has been extremely difficult, and at times impossible, to communicate with her. Without her input, habeas corpus factors were impossible to investigate (e.g., ineffective assistance of counsel regarding her not guilty by reason of insanity defense, her alleged waiver of such a defense). By

applying the standard(s) in Wiggins v. Smith, Ms. Nelson's time limitation period should actually begin to run from the date of the Wiggins decision on June 26, 2003. 28 U.S.C. §2244(d)(1)(C) and Wiggins v. Smith, 539 U.S. 510; 123 S.Ct. 2527; 156 L.Ed.2d 471 (2003).

CONCLUSION

On two very significant occasions, Omaima Nelson's mental state should have been the subject of serious consideration. However, on both occasions, Ms. Nelson's actual mental state was not given serious consideration and was not the basis of the ultimate decision. Her actual mental state was disregarded.

In the first instance, at the trial, when the judge expressed serious concerns about Ms. Nelson's mental state, her trial counsel stated that he did not want her to spend the rest of her life in a mental institution, and as a result, no action was taken on her behalf with respect to her mental state, and no evidentiary hearing(s) was held. This was notwithstanding the fact that at the time of her trial, mental health experts had examined the petitioner and came to the conclusion that several mental health issues existed, including her competency.

After her conviction, when Ms. Nelson's habeas corpus counsel sought relief before the United States District Court, the magistrate denied her claim. The magistrate ultimately stated that according to her calculations, habeas corpus counsel had waited two months longer than the AEDPA would allow, and as a result, the subject of Ms. Nelson's mental state was again not considered, no action was allowed to be taken on her behalf, and no evidentiary hearing was held.

When Ms. Nelson's request to allow equitable tolling to

protect her claim was denied, the magistrate's calculation was based upon a statement which had been made by her habeas corpus counsel that she was, at some point, improving. The magistrate disregarded the statements of mental health experts and appears to have relied upon what amounted to a passing statement made by habeas corpus counsel, at some point in the process, that Ms. Nelson's mental state was improving. Obviously, counsel has no special training in treating or diagnosing mental illness; indeed, the statement was only counsel's observation that at a certain point in time, Ms. Nelson was becoming more responsive and helpful. It was after the point in time of counsel's observation that Ms. Nelson was examined and determined to be still suffering significantly from her mental illness. Ms. Nelson has subsequently received treatment for her mental illness and she has been responsive to this treatment.

Clearly, Omaima Nelson's mental illness has interfered with her ability to assist her trial counsel, and has interfered with her ability to assist her habeas corpus counsel. Her constitutional right to a fair trial, as yet, has not been fully provided. This Court, on several occasions, has addressed the concerns raised by Ms. Nelson's mental illness in Dusky v. United States, Drope v. Missouri, Pate v. Robinson, Godinez v. Moran, and Cooper v. Oklahoma; however, in this instance, unless this Court recognizes that Omaima Nelson's mental illness should allow equitable tolling to protect her claims, she will never have an opportunity to completely exercise the considerable rights which have been recognized by this Court.

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
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Respondent - Appellee.

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OMAIMA NELSON,
Petitioner - Appellant,

v.

GWENDOLYN MITCHELL,
Respondent - Appellee.

No. 04-55124
D.C. No. CV -02-00615-CAS
Central District of California, Santa Ana

ORDER

Filed June 1, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: KOZINSKI and SILVERMAN, Circuit Judges.

Petitioner's motion for reconsideration is denied. See 9th Cir. R. 27-10. No further filings shall be accepted in this closed docket.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OMAIMA NELSON,
Petitioner - Appellant,

v.

GWENDOLYN MITCHELL,
Respondent - Appellee.

No. 04-55124
D.C. No. CV-02-00615-CAS
Central District of California, Santa Ana

ORDER

Filed April 30, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: TROTT and T.G. NELSON, Circuit Judges.

The request for a certificate of appealability is denied.

See 28 U.S.C. § 2244(d)(1).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent.

No. SA CV 02-00615-CAS (VBK)

ORDER

DENYING CERTIFICATE OF APPEALABILITY

Filed January 5, 2004
Clerk, U.S. District Court
Central District of California
By Deputy

On December 19, 2003, Petitioner filed a "Petition for Certificate of Appealability" and a "Notice of Appeal" of the Judgment entered herein on November 24, 2003.

Under 28 U.S.C. §2253(C)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." After review of Petitioner's contentions herein, this Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right, as is required to support the issuance of a

Certificate of Appealability. See 28 U.S.C. §2253(C)(2).

Accordingly, the Application is DENIED.

DATED: December 31, 2003

"s/CHRISTINA A. SNYDER",
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

Presented this 30th day of December, 2003 by:
"s/VICTOR B. KENTON"
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent.

No. SA CV 02-00615-CAS (VBK)

ORDER

JUDGEMENT

DENYING PETITION AND DISMISSING PETITION WITH PREJUDICE

Filed November 24, 2003
Clerk U.S. District Court
Central District of California
By: "s/[illegible]" Deputy
Entered November 25, 2003
Clerk U.S. District Court
Central District Court of California
By: "s/[illegible]" Deputy

Pursuant to the Order Accepting and Adopting the Amended Report and Recommendation of the United States

Magistrate Judge, and dismissing the Petition for Writ of Habeas Corpus ("Petition") with prejudice,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: November 17, 2003

"s/CHRISTINA A. SNYDER",
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent(s).

No. SA CV 02-00615-CAS (VBK)

ORDER
(1) ACCEPTING AND ADOPTING
THE AMENDED REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE, AND
(2). DISMISSING THE PETITION
FOR WRIT OF HABEAS CORPUS

Filed November 24, 2003
Clerk U.S. District Court
Central District of California
By: "s/[illegible]" Deputy
Entered November 25, 2003
Clerk U.S. District Court
Central District Court of California
By: "s/[illegible]" Deputy

Pursuant to 28 U.S.C. §636, the Court has made a de novo review of the Petition for Writ of Habeas Corpus ("Petition"), Respondent's Motion to Dismiss, Petitioner's

Response to Motion to Dismiss, all of the records herein and the Amended Report and Recommendation of the United States Magistrate Judge.

IT IS ORDERED that: (1) the Court accepts and adopts the Amended Report and Recommendation, (2) Respondent's Motion to Dismiss is GRANTED, and (3) Judgment be entered denying and dismissing the Petition with prejudice.

DATED: November 17, 2003

"s/CHRISTINA A SNYDER"
CHRISTINA A SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent(s).

No. SA CV 02-00615-CAS (VBK)

AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Filed October 17, 2003

This Amended Report and Recommendation is submitted to the Honorable Christina A. Snyder, United States District Judge, pursuant to the provisions of 28 U. S. C. §636 and General Order 01-13 of the United States District Court for the Central District of: California.

INTRODUCTION

On May 20, 2002, Omaima Nelson (hereinafter referred to as "Petitioner"), a California state prisoner represented by counsel, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody," pursuant to 28 U.S.C. §2254 ("Petition"), in the United States District Court for the Eastern District of California. On June 24, 2002, an Order of Transfer was issued by United States Magistrate Judge Lawrence J. O'Neill of the Eastern District of California, transferring the Petition to the

United States District Court for the Central District of California.

On July 1, 2002, the Petition was filed in the United States District Court for the Central District of California. On July 2, 2002, the Court issued an Order dismissing the Petition with leave to amend as the Petition was not filed on the proper form utilized by Local Rule 26.1 of the United States District Court for the Central District of California. On November 7, 2002, Petitioner filed a First Amended Petition. Respondent filed a Motion to Dismiss ("MTD") on January 16, 2003, contending that the Petition was barred by the one--year statute of limitations set forth in 28 U.S.C. §2244(d)(1) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). On January 22, 2003, the Court issued a Minute Order ordering Petitioner to file an Opposition or Statement of Non--Opposition. Petitioner filed an Opposition to the Motion to Dismiss on April 21, 2003.

For the reasons set forth below, it is recommended that the Motion to Dismiss be granted and that the Petition be dismissed with prejudice as untimely.

PRIOR PROCEEDINGS

On January 12, 1993, Petitioner was convicted by a jury in Orange County Superior Court of one count of second-degree murder in violation of California Penal Code §187 and assault with a firearm in violation of California Penal Code §12022(b). Petitioner was sentenced to a total sentence of 27 years to life. (See First Amended Petition at 3)

Petitioner appealed her conviction and on February 28, 1995 (sic) the Court of Appeal affirmed the judgment of

conviction and sentence in its entirety. (See First Amended Petition at 3) On April 6, 1995, Petitioner filed a Petition for Review in the California Supreme Court which was denied on May 31, 1995.

Petitioner filed a Petition for Writ of Habeas Corpus in the Orange County Superior Court on September 21, 1999. The Orange County Superior court denied that petition on October 20, 1999.

On March 8, 2000, Petitioner filed a Petition for Writ of Habeas Corpus in the California Court of Appeal. On August 31, 2000, in an unpublished opinion, the California Court of Appeal granted, in minor part, the petition for Writ of Habeas Corpus, ordering that the Penal Code §12022.1, two-year enhancement be vacated. In its ruling, the Court of Appeal stated, "[I]n her recently filed petition for a writ of habeas corpus, Nelson raised numerous issues, only one of which we have found might have merit." On November 30, 2000, Petitioner filed a Petition For Writ of Habeas Corpus in the California Supreme Court. On. May 23, 2001, the California Supreme Court denied the petition.

The within Petition was filed on May 20, 2002.

STATEMENT OF FACTS

The statement of facts is taken from the California Court of Appeal opinion:

> "[Petitioner] spent Thanksgiving weekend of 1991 killing, decapitating, dismembering, disemboweling, cooking, and freezing William Nelson, her husband of four weeks . . . ."
>
> By her own report, [petitioner] was the victim of almost

unimaginable abuse as a child in Egyp[t. The report states that over the Thanksgiving weekend. The police investigation report is on discussed on page 4.] A partial arm and two partially cooked hands were found, but many parts c)f the victim were never located. The total weight of the body parts found was only about 100 pounds. In life, William had weighed 230.

The Police found the couple's bloody mattress flipped over so that the bloodstained side was facing the floor. A second bloodstained mattress was standing against a bedroom wall and a pool of blood was underneath the bed. Bloodstained sheets, still wet, were in a basket near the bed. Neckties were discovered, tied together so as to suggest that they had been used as ligatures along with belts and electrical cords with blood on them. Circular discolorations above the victim's ankles indicated he had been tied up prior to death.

The bedroom and bathroom walls and the bed's headboard had been recently washed. Tests of these areas confirmed the presence of blood. Some two dozen knives, several with blood on them, were found in the apartment along with trash bags. A test of blood found on one knife handle: was consistent with the victim's blood type. An iron with the bottom metal plate broken off from the plastic upper portion was found in the bedroom closet. The plate was bloodstained and had hairs consistent with William's. His skull contained significant breaks consistent with being struck by the edge of an iron. The breaks would have been enough to stun a person or cause unconsciousness.

William's heart and left lung were recovered, and found to have stab and slash wounds. The forensic pathologist who conducted an autopsy of William's remains concluded he died from either stab wounds that cut his heart, left lung

or carotid artery, or blows to the head.

The day of her arrest, [Petitioner] accused William of sexually assaulting her Thanksgiving evening and was taken to a hospital for a rape examination. The purported assault included vaginal and rectal penetration with his penis and fingers. She also claimed William tied her hands, bit, kicked, grabbed and choked her and threatened to kill her.

The examining physician saw multiple contusions on [Petitioner's] body and multiple superficial lacerations on her chest, back, arms, feet and thighs that appeared to have occurred within the preceding two days. A treating nurse testified she did not observe any bite or ligature marks or bruising that indicated [Petitioner] had been choked. A visual exam of [Petitioner's] vagina and rectum did not indicate any tearing, bruising, bleeding or swelling associated with a sexual assault. No semen was found in her vagina or rectum or her underwear.

The prosecution presented evidence suggesting that [Petitioner] killed her husband to obtain his money and other property and accomplished the act by luring him into bed, tying him down and then stabbing and bludgeoning him. The defense focused on [Petitioner's] state of mind when she killed William. [Petitioner] testified about her life experiences with abuse. She claimed Richard Gray [she had a relationship with Richard Gray between approximately 1988 and 1990] frequently beat her when she lived with him, and said that while her relationship with William had started off well, it had degenerated into a cycle of physical and sexual abuse.

She said that on Thanksgiving, both of them were drinking and she was taking Valium. William asked her to engage in anal sex and bondage. Petitioner said she

handcuffed her husband to a chair at his request, but then refused his sexual demands, and he later sexually assaulted her, sitting on top of her and forcing her to orally copulate him. On Friday, [Petitioner] threatened to leave and he apologized and promised not to hurt her any more.

But [Petitioner] testified the physical abuse and sexual assaults started again Saturday afternoon. [Petitioner] testified William forced her onto the bed, claiming he was going to rape her and demanding she orally copulate him. He pulled out a pocket knife and cut her on the breast; he tied her hands behind her back, inserted his fingers into her rectum and covered her mouth to prevent her from screaming. Fearing for her life, she freed one hand, grabbed a nearby pair of scissors and stabbed William in the chest and the neck, struck him with an iron, and threw a lamp at him.

[Petitioner] denied intending to kill William or planning to take his money. She claimed to have very little memory of his dismemberment, but recalled cutting off his penis and his ring finger, cleaning the apartment, and packaging the body parts.

The defense presented the testimony of two mental health experts. Dr. David Sheffner, psychiatrist, conducted four interviews with [Petitioner]. He concluded she was suffering from a chronic psychosis, probably a form of schizophrenia and that the psychosis existed before she killed William. Dr. Nancy Kaser-Boyd, a clinical psychologist who spent 20 to 25 hours with [Petitioner], diagnosed her as suffering from post traumatic stress disorder and said she also fit the definition of a psychotic."

(California Court of Appeal Opinion at pp. 2-6.)

PETITIONER'S CONTENTION'S

Petitioner contends the following, inter alia:

1. Violation of constitutional right to due process by failing to instruct on unconsciousness defense;

2. Violation of constitutional right to due process by failing to instruct the jury on evidence of mental disease as to the inability to form specific intent;

3. Violation of constitutional right to due process by failure to consult with Petitioner regarding a not guilty by reason of insanity plea;

4. Violation of constitutional right to due process by denying Petitioner the right to be present at all important stages of the proceedings;

5. Violation of constitutional right to due process by failing to hold a competency hearing in light of the substantial evidence of Petitioner's psychosis;

6. Ineffective assistance of counsel;

7. Trial court violated constitutional right to due process by causing a 17-day delay in giving jury instructions after closing arguments;

8. Trial court violated Petitioner's right to due process by failing to present adequate instruction of defense of battered woman syndrome; and,

9. Ineffective assistance of counsel.

(See First Amended Petition at 4-78)

DISCUSSION

In the Motion to Dismiss, Respondent contends that the Petition should be dismissed on the ground that the Petition is untimely.

A. The Petition Is Facially Untimely.

Since the Petition was filed after the President signed into law the AEDPA on April 24, 1996, the Court's consideration of the Petition's timeliness is governed by 28 U. S. C. §2244 (d), as amended by the AEDPA. See Calderon v. United States District Court for the Central District of California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S. 1061 (1998)[1]. That section provides:

> "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or,
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

---

1 Beeler was overruled on other grounds in Calderon. v. United States District Court (Kelly), 163 F. 3d 530, 540 (9th Cir. 1998) (en bane). cert. denied, 119 S. Ct. 1377 (1999).

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In most instances, a state prisoner's AEDPA limitations period will be governed by §2244 (d) (1) (A). It is only in "rare: instances" that, pursuant to §§2244 (d) (1) (B) - (D), "the limitation period may run from a date later than the date on which judgment becomes final." Baker v. State of California, 2000 WL 74071 at *1 (N.D. Cal. 2000). In the Motion to Dismiss, Respondent contends that the running of the limitations period in this case is governed by §2244 (d) (1) (A).

Petitioner, however, seeks a later start date based on §2244(d) (2).

1. Application Of §2244 (d) (1) (A) Renders The Petition Facially Untimely.

Under §2244 (d) (1) (A), the statute began to run at the completion of direct review in the state courts. Here, the Court of Appeal affirmed Petitioner's conviction on February 28, 1995. Petitioner filed a Petition for Review in the California Supreme Court on April 6, 1995, which was denied on May 31, 1995. Consequently, the judgment became final on August 30, 1995, when Petitioner's time to petition the United states Supreme Court for a writ of certiorari expired.[2] Bowen v. Roe, 188 F.3d

[2] Per United States Supreme Court Rule 13.1, Petitioner had 90 days from the date of the Order denying her Petition for Review became final to petition the Supreme Court for a writ of certiorari.

1157,1158-59 (9th Cir. 1999).

However, prisoners, like Petitioner, whose convictions became final prior to the enactment of AEDPA, had until its one-year anniversary date, April 24, 1997, in which to file a federal habeas petition. Patterson v. Stewart, 251 F.3d 1243-45 (9th Cir. 2001). Here, Petitioner filed her federal Petition on May 20, 2002. The Petition was filed five years beyond the one-year anniversary date, and is therefore facially untimely unless petitioner is entitled to statutory or equitable tolling.

B. Petitioner Is Not Entitled To Statutory Tolling.

The running of the AEDPA's one-year time limitation is tolled for the time period during which a properly filed application for post-conviction or other state collateral review is pending in state court. See 28 U.S.C. §2244(d)(2); Duncan v. Walker, 531 U.S. 991, 121 S.Ct. 2120 (2001) (The statutory term "other collateral review" refers to other state collateral review). The statute is tolled from "the time the first state habeas was filed until the California Supreme Court rejects the petitioner's final collateral challenge." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.), cert. denied, 529 U S. 1104, 120 S. Ct. 1846 (2000); accord, Welch v. Newland, 267 F.3d 1013 (9th Cir. 2001).

Continuous tolling applies, however, only for "the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Nino, 183 F.3d at 1006, quoting Barnett v. LeMaster, 167 F.3d 1321,

1323 (10th Cir. 1999). "This tolled period included intervals between the disposition of a state court petition and the filing of a subsequent petition at the next state appellate level." Welch, 267 F.3d at 1016. A state habeas petition will remain "pending" within the meaning of AEDPA during the interval between a lower court's entry of judgment and the timely filing of a new habeas petition in a higher state court. Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 2139-41 (2002).

Here, Petitioner's counsel filed a habeas petition in the Orange County Superior Court on September 21, 1999. It was denied on October 20, 1999. Petitioner filed a habeas petition on March 8, 2000 in the California Court of Appeal which was denied on August 31, 2000. Petitioner also filed a habeas petition in the California Supreme Court on November 30, 2000, which was denied on May 23, 2001. These petitions were filed approximately three and one-half years too late. State habeas petitions filed in state courts after the expiration of the period of limitations do not revive the filing period. Jimenez v.Rice, 276 F.3d 478, 481 (9th Cir. 2001); Green v. Rice, 223 F.3d 1001, 1003 (9th Cir. 2000). Thus, Petitioner is not entitled to statutory tolling.

C. Petitioner Is Not Entitled To Relief Based on Equitable Tolling.

1. Factual Contentions.[3]

Petitioner contends she is entitled to equitable tolling based on her

[3] Petitioner's factual contentions in support of her argument for equitable tolling are contained in her response to the State of California's Motion to Dismiss the Writ of Habeas Corpus. Unless otherwise noted, all page and exhibit citations are in reference to that Response.

serious mental problems, her sexual abuse since childhood, slavery, forced drug use and prostitution.

Petitioner retained her present habeas counsel on August 5, 1995. (Page 2) In 1995, Petitioner's counsel reviewed the trial transcripts, appellate briefs, and other materials "relative to the appeal of this case." (page 3) Although counsel interviewed Petitioner during the latter part of 1995, he asserts these interviews were difficult due to Petitioner's "particularly disorganized mental state..." (Page 3) Counsel asserts that Petitioner demonstrated an inability to fully cooperate or communicate with counsel due to her mental state. (Id.) Counsel asserts that although Petitioner was "getting better" during early 1996, he was still experiencing communication problems with her during that time period. (Page 4) In October 1996, Petitioner's counsel met with Dr. Nancy Kaser-Boyd, a forensic psychologist (see Ex. D, Dr. Kaser-Boyd's Declaration), and Dr. Theresa Farjalla, who had been Petitioner's treating doctor while she was in custody prior to and during her trial. (Page 5)

In a later meeting with Petitioner in October 1996, counsel was able to gather sufficient information from her "so as to be able to contrast what Petitioner was able to remember, and not remember, with the trial transcript." (Id.) During this period of time, Petitioner's habeas counsel was seeking various medical, psychological and psychiatric reports from Petitioner's trial counsel. (Page 6) In late 1996, Petitioner started to become more lucid, and she was able to communicate more with her counsel about issues pertaining to the waiver of her insanity defense at her trial. (Page 6)

In July of 1997, petitioner's habeas counsel received all of

the materials which he had been seeking from petitioner's trial counsel. In September 1997, Petitioner's counsel asserts unconsciousness and the insanity defense, and in order to obtain additional expert support, counsel in 1998 retained Dr. Miles Estner, a forensic psychiatrist. Dr. Estner was retained "to advise counsel on the viability of the unconsciousness and insanity defenses." (Page 8; see also Dr. Estner's Declaration at Ex. C)

On May 13, 1998, habeas counsel and Dr. Estner visited Petitioner at her custodial facility. Petitioner appeared to by psychotically paranoid and refused to be examined by Dr. Estner, according to counsel. (Page 9) At the next examination on May 21, 1998, Petitioner cooperated fully with Dr. Estner. (Id.)

Petitioner's counsel asserts that Petitioner lacked experience or education in law, and also lacked the mental capacity to reason or assist habeas counsel in her defense. (Page 15) Significantly, Petitioner's counsel states that,

> "At present, however, Petitioner through her efforts of self-education, psychiatric treatment, devoted prayer, and the love and support of her new husband, has improved her mental condition enough to assist in her defense. This has only occurred since late 1997." (Page 15, emphasis added)

Petitioner's counsel also asserts:

> "It is clear from the medical records, and opinions of medical experts that the Petitioner was incompetent to assist in her own defense, assist counsel in the preparation of a writ of habeas corpus, much less understand and undertake the preparation for a Petition For A Writ of Habeas Corpus until mid 1998 at the earliest. Thus, 'equitable tolling' is appropriate until such time as the Petitioner became competent." (Page 18)

Petitioner has also submitted the Declaration of Dr. Estner in support of her equitable tolling argument. (See Ex. C) In his Declaration, Dr Estner asserts that petitioner suffers from a Dissociative Disorder or a form of Post-Traumatic Stress Disorder. (Ex. C at 1) Dr. Estner states that he visited Petitioner on May 13, 1998, accompanied by habeas counsel, but that Petitioner "appeared to psychotically paranoid and refused to be examined by me." (Ex, C at 2) He notes that he next saw Petitioner on May 21, 1998, at which time he was able to examine her. (Id.)

In his Declaration, Dr. Estner renders his professional opinion as to Petitioner's mental state at the time of the offense (See Ex. C, at 3), but, significantly, fails to render any opinion as to whether Petitioner was, at any time following judgment, incapable of assisting habeas counsel in preparing the Petition.

Similarly, Petitioner submits the Declaration of forensic psychologist Dr. Nancy Kaser-Boyd. (see Ex. D) Dr. Kaser-Boyd states that she examined Petitioner 7 times over 25 hours while Petitioner was awaiting trial, but does not indicate that she has seen Petitioner since the trial. Nevertheless, Dr. Kaser-Boyd opines that Petitioner was deeply psychotic at the time of the incident, and most likely for at least several weeks following the incident. (See Ex. D at 1) Dr. Kaser-Boyd renders no opinion as to whether Petitioner was incapable of assisting her habeas counsel at any time following the judgment.

On October 10, 2003, Petitioner filed Objections to the Report arid Recommendation along with a "Supplemental Declaration of Roger T. Nuttall ('Supplemental Nuttall

Declaration')" and a "Supplemental Declaration of Dr. Miles Estner ('Supplemental Estner Declaration')." In the Supplemental Nuttall Declaration, Petitioner's counsel does not contradict his earlier contention as to when Petitioner was competent to assist in the preparation of the Petition ("As counsel for the Petitioner, your Declarant has always maintained that the Petitioner herein was incompetent to assist . . . in the preparation of the Petition. . . until at least Mid-1998, at the very earliest; . . ." [Supplemental Nuttall Declaration, at 4] [emphasis in original]). In the Supplemental Estner Declaration, Dr. Estner states that, following the filing of the Report and Recommendation, Petitioner's attorney contacted him and asked him to review his file to form a professional opinion as to whether or not petitioner was competent to assist in the preparation of the Petition after mid-1998. (See Supplemental Estner Declaration, at 3) Dr. Estner does not contradict his earlier Declaration, in which he stated that he visited petitioner on three occasions: May 13, 1998, May 21, 1998, and August 27, 1998 (see Declaration of Dr .Miles Estner, Ex. C to Petitioner's Response to Motion to Dismiss, at 6, 7, and 9). Further, in his Supplemental Declaration, Dr. Estner does not assert that he has examined Petitioner at any time after August 27, 1998, nor does he declare that he has reviewed any medical or mental health records, or any other records which would concern or document Petitioner's mental condition at any time after August 27, 1998. Nevertheless, Dr. Estner opines that, "[I]t is highly likely that the Petitioner, during the years 1998 and 1999, based upon her incompetency, lacked the-consistent ability to rationally assist [Petitioner's counsel] in the preparation of her Habeas Corpus Petition." (Supplemental Estner Declaration, at 5)

2. Applicable Law And Analysis.

The AEDPA's limitations period may be subject to equitable tolling if a petitioner can demonstrate that "extraordinary circumstances" exist which justify such tolling. See, Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc), cert. denied, 119 S.Ct. 1377 (1999); Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1287-89 (9th Cir. 1997). However, equitable tolling is unavailable in most cases. See, Corjasso v. Avers, 268 F.3d 874 (9th Cir. 2002); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). In the Ninth Circuit, one of two circumstances must exist before equitable tolling may apply: (1) The Respondent's wrongful conduct somehow has prevented the habeas petitioner from asserting his or her claims; or (2) extraordinary circumstances beyond the Petitioner's control made it impossible to file the claims on time. Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996). See also Beeler, 128 F.3d at 12 88-89 (equitable tolling will not be available in most cases as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time).

In Ross v. Hickman, 2001 WL 940911 *2 (N. D. Cal.) the District Court held, "Mental incompetency may equitably toll the AEDPA's limitation period because mental incompetency is an extraordinary circumstance beyond a prisoner's control." See Kelly, 163 F.3d at 541. But a showing of mental illness alone will not toll the limitation period. Under federal common law, mental illness tolls a limitation period only if 'the illness in fact prevents

the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them.' Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996)." The Petitioner in Ross alleged that his mental illness prevented him from functioning on a sufficiently normal level. The Ross Court found that Petitioner's alleged enrollment in a prison mental health program and receipt of psychotropic medication did not in of itself establish that he was mentally incompetent.

"Most mental illnesses are treatable, and with proper treatment many, if not most, sufferers are capable of managing their own affairs." See Miller v. Runyon, 77 F. 3d at 192. In order to overcome the limitation barrier, petitioner must show that mental illness or other disability rendered her incapable of filing a habeas petition before the limitation period expired. Rhodes v. Sennkowski, 82 F.Supp.2d 160, 169-70 (S.D.N.Y. 2000) (prisoner must show that medical/mental problems rendered him unable to pursue his legal rights during relevant time period). The petitioner in Kelly made a substantial showing of mental illness which was documented in a report listing extensive behavioral manifestations of the petitioner's illness and a psychiatrist's conclusion that the severity of the petitioner/s mental disorder precluded his capacity to appreciate his current legal position and make rational choices with respect, to court proceedings. See Kelly, 163 F.3d at 541 (citing Calderon v. United States District Court (Kelly), 127 F. 3d 782, 788 n. 1.)

This case is unlike Kelly, Petitioner's counsel contends that at the outset of his representation, in 1995, he was in possession of the trial transcripts as well as appellate briefs. Moreover, by July of 1997, counsel had received the medical, psychological and

psychiatric records which he alleges he had been seeking from trial counsel. Counsel concedes that as of late 1997 Petitioner's mental condition improved to the extent that she was able to assist in the preparation of her habeas petition. In another part of his argument, Petitioner's counsel contends that until mid-1998, Petitioner was incompetent to assist in preparation of the writ. It is reasonable to conclude, therefore, that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition. Petitioner did not, however, seek collateral relief in the state court until she filed a Petition for Writ of Habeas Corpus in the Orange County Superior Court on September 21, 1999, a period in excess of one year after the latest date she was competent and able to assist her counsel in preparing a petition. Thus, even under the most liberal analysis, which gives full credit to her counsel's assertions as to Petitioner's competency, equitable tolling due to incompetency would have required that a petition be filed within one year of the date Petitioner became competent to assist her counsel. That date would be July 1, 1999. Since her first state habeas petition was filed after that date, Petitioner's cause cannot be aided by equitable tolling, since the one-year period provided by 18 U.S.C. §2244 (d) had already expired by the time Petitioner filed her first state habeas petition.[4]

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[4] Petitioner's reliance on Crawford v. Oregon State Hospital, 2002 WL 505943 (9th Cir. (Or.)) is misplaced. The petitioner in Crawford was not represented by counsel in the habeas proceeding, had been initially found incompetent to stand trial and was confined to the state hospital. The Court in Crawford, based on the record before it, was unable to determine whether Crawford's mental condition between the time his state habeas petition was dismissed and the time his AEDPA clock had run out had deteriorated enough to prevent him from timely filing a federal petition.

In her Objections, Petitioner contends that the new assertions set forth in the two supplemental declarations no longer permit the Court to conclude that by July 11, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition. The Court disagrees.

In the Supplemental Nuttall Declaration, Petitioner's counsel now asserts that it has been his consistent position that even at. the time of filing the Petition, "[T]he Petitioner still exhibited significant signs of mental incompetency which interfered with the preparation of the Habeas Petition; . . . " (See Supplemental Nuttall Declaration, at 10) Further, Petitioner's counsel asserts that even as of the present date, "Petitioner's ability to continue to assist in her legal matters is substantially hindered by such continuing mental difficulties; . . ." (Id., at 11) Despite the protestations of counsel to the contrary, these assertions directly contradict his assertions that by mid-1998 (which the Court has liberally construed as July 1, 1998), Petitioner was sufficiently mentally competent to assist in the preparation of the Petition. The current assertions of Petitioner's counsel are nothing more than backpedaling in an attempt to avoid the dismissal of the Petition due to untimely filing. Petitioner's counsel is taking fundamentally inconsistent positions in this litigation. Especially in view of the fact that these new contentions have surfaced for the first time in Petitioner's Objections, the Court concludes that the doctrine of judicial estoppel should be invoked here. The doctrine was succinctly stated in Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990):

"In her dissent to Religious Technology Center v. Scott,

869 F.2d 1306, 1311 (9th Cir. 1989) (citation omitted), Judge Hall sets forth the principles underlying judicial estoppel:

> The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. See 1B Moore's Federal Practice 405[8], at 238-42 (2d Ed. 1988). "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.'" Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984), cert. denied, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985) (citations omitted). Judicial estoppel is 'intended to protect against a litigant playing fast and loose with the courts.'" Rockwell International Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 12.08, 1210 (9th Cir. 1988) (citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.
>
> ... Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. See generally Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo.Wash.L.Rev. 409, 410-1:2 (1987); Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw.U.L.Rev.1244 (1986)."

Further, in this Circuit it is not mandatory that the Court consider evidence raised for the first time in a party's objections

to a Magistrate Judge's Report and Recommendation. See Brown v. Roe, 279 F.3d 742, 744 (9th Cir. 2002). Under the holding of Brown, the District Court must indicate whether it exercised its discretion in determining whether to consider such new evidence. Here, the Court declines to consider the new evidence in the Objections. The reasons for this are several. First, Respondent's Motion to Dismiss, filed on January 16, 2003, clearly argued that this Petition is untimely. As the Court noted in its Minute Order of September 16, 2003, Petitioner's counsel asked for, and received, two significant extensions of time to reply to the Motion to Dismiss. Thus, the Court concludes that Petitioner's counsel had extremely ample time and opportunity to respond to the issues raised in the Motion to Dismiss, yet failed to raise this purportedly new evidence until after the Court issued its Report and Recommendation. Especially in view of the fact that Petitioner has been represented by this counsel in post-judgment collateral review matters since 1995, the conduct of Petitioner's counsel is inconsistent with the orderly administration of justice and proper regard for the dignity of judicial proceedings. Moreover, the issue is not simply that Petitioner has raised new evidence in the Objections rather, the more significant point is that this new evidence contradicts and is inconsistent with the factual positions taken by Petitioner in her Response to the Motion to Dismiss, and Supporting Declarations, filed April 21, 2003. Further, the fact that Petitioner has been represented by her present counsel for approximately eight years in post-judgment collateral review matters distinguishes this case from Brown. In that case, the Ninth Circuit made it clear that a significant factor to be considered by a Court in determining whether to consider new

evidence filed for the first time in objections is whether the petitioner is pro se or is represented. The Petitioner in Brown was pro se, a point which the appellate court significantly underscored. Moreover, even with a pro se petitioner, the Court may still exercise its discretion not to consider new evidence raised for the first time in Objections. This case, however, is at the opposite end of that spectrum.

The Supplemental Estner Declaration adds no credibility to Petitioner's position, and in fact, detracts from it. Dr. Estner last saw Petitioner in August of 1998, when he visited her and conducted his second successful interview. Nevertheless, despite the fact that Dr. Estner has not seen Petitioner since August of 1998, and has not reviewed any relevant mental health or other records post-dating that interview (other than to state his understanding that she has not received "necessary [mental health] treatment" [see Supplemental Estner Declaration at 5]), Dr. Estner still opines that through 1998 and into 1999, Petitioner was incompetent to assist her counsel in his preparation of her Petition. Based on the absolute lack of any evidence to support this conclusion, the Court accords no credibility to Dr. Estner's current assertion.

Moreover, Petitioner's counsel misconstrues the doctrine of equitable tolling. Petitioner's counsel had more than adequate information in his possession to timely file a habeas petition. The record is clear that Petitioner's counsel had received all of the necessary transcripts and other evidence necessary to prepare a petition, and had successfully met with Petitioner and obtained information from her to timely prepare a petition. See, Flanagan v. Johnson, 154 F.3d 196,198-199 (5th Cir. 1998) ("Section

2244(d)(1)(D) does not convey a statutory right to an extended delay, . . . , while a habeas petitioner gathers every possible scrap of evidence that might, . . . , support his claim."); accord Ross v. Hickman, 2001 WL 940911 (N.D. Cal.); Hasan v. Galaza, 254 F.3d 1150, 1154, N.3 (9th Cir. 2001) (stating that the statute of limitations begins to run when a prisoner "knows or through diligence could discover the important facts, not when the prisoner recognizes their legal significance.")

Similarly, even if the Court were to consider that equitable tolling would apply due to the inability of Petitioner's counsel to obtain medical, psychiatric and psychological records[5], this would lend no support to Petitioner's argument that her federal petition is timely, because her counsel asserts that those records were received in July of 1997. Under that analysis, Petitioner's one-year period would have expired in July of 1998.

Petitioner also advances her ignorance of the law and her lack of legal sophistication. The fact that Petitioner has had legal counsel assisting her in collateral review proceedings since 1995 defeats that argument. In any event, it is firmly established that ignorance of the law and lack of legal sophistication do not constitute "extraordinary circumstances" warranting equitable tolling. See, e.g., Hood v. Galaza, 47 F.Supp. 2d 1144, 1148 (S.D. Cal. 1999); Harrisonv. Galaza, 1999 WL 58594 at *2

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[5] In United States v. Van Poyck, 980 F.Supp. 1108, 1110-11 (C.D. Cal. 1997), the Court found that a petitioner's circumstances were not (extraordinary in the following circumstances: inability to obtain transcripts from court reporters and general prison lockdowns. See also Fadayiro v. United States, 30 F.Supp.2d 772, 779-80 (D.N.J. 1998) (delay in receipt of transcripts does not justify equitable tolling).

(N.D. Cal. 1999); Atkins v. Harris, 1999 WL .13719 at *2 (N.D. Cal. 1999); Jones v. Galaz, 1998 WL 720638 at *2 (N.D. Cal. 1998); Bolds v. Newland, 1997 WL 732529 at *2 (N.D. Cal. 1997). "Ignorance of the law, even for an incarcerated pro se Petitioner, generally does not excuse prompt filing." Green v. Olivarez, 2000 WL 432818 at *2 (N.D. Cal. 2000).

Here, Petitioner has been represented by the same post-conviction counsel since 1995.[6] That Petitioner suffered from and was treated for mental illness in the past is not sufficient to show that mental illness rendered her unable to pursue her legal rights during the relevant time period. Petitioner is not entitled to equitable tolling because she has not met her burden of showing that mental illness or other disability was the "but for" and proximate cause of her untimeliness and that. her mental illness rendered her and her counsel incapable of filing a habeas petition before the statute of limitations expired. Thus, the Petition is untimely and should be dismissed.

RECOMMENDATION

For all the foregoing reasons, IT IS HEREBY RECOMMENDED that the District Court issue an order: (1) Approving and adopting this Amended Report and Recommendation; (2) Granting Respondent 's Motion to Dismiss; and (3) Directing that Judgment be entered denying and

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[6] In Miranda v. Castro, 292 F.3d 1063, 1068 (9th Cir. 2002), the Court held that counsel's mistake regarding habeas statute of limitations does not warrant equitable tolling. See also Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001), cert. denied, 535 U.S. 1055 (2002) (holding that miscalculation of the limitations period by counsel and counsel's negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling).

dismissing the Petition with prejudice.

DATED: October 17, 2003
"s/VICTOR B. KENTON"
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

OMAIMA NELSON,
Petitioner,

v.

GWENDOLYN MITCHELL, WARDEN,
Respondent(s).

No. SA CV 02-00615-CAS (VBK)

PROPOSED ORDER

(1) ACCEPTING AND ADOPTING
THE AMENDED REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE, AND
(2) DISMISSING THE PETITION FOR
WRIT OF HABEAS CORPUS

Pursuant to 28 U. S. C. § 636, the Court has made a de novo review of the Petition for Writ of Habeas Corpus ("Petition"), Respondent's Motion to Dismiss, Petitioner's Response to Motion to Dismiss, all of the records herein and the Amended Report and Recommendation of the united States Magistrate Judge.

IT IS ORDERED that: (1) the Court accepts and adopts the Amended Report and Recommendation, (2) Respondent's

Motion to Dismiss is GRANTED, and (3) Judgment be entered denying and dismissing the Petition with prejudice.

DATED: _____

_____

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
04 286 AUG 27 2004
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
Warden, et al.,

Respondent - Appellee.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
U.S.C.A. No. 04-55124
U.S.D.C. No. CV-02-00615-CAS

PETITION FOR WRIT OF CERTIORARI

APPENDIX

VOLUME 2 of 2

(SPACE BELOW FOR FILING STAMP ONLY)

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ATTORNEYS FOR Petitioner
OMAIMA NELSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * *

OMAIMA NELSON,

Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,

Respondent,

PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S AMENDED REPORT AND RECOMMENDATION FILED ON OCTOBER 17, 2003.
and
SECOND SUPPLEMENTAL DECLARATION OF ROGER T. NUTTALL

Petitioner, OMAIMA NELSON, by and through her

counsel, ROGER T. NUTTALL, hereby submits objections to the Amended Report and Recommendation of the United States Magistrate Judge filed on October 17, 2003.

By way of history, On August 27, 2003, an original Report and Recommendation of the United States Magistrate Judge was filed with the Clerk of the Central District.

Thereafter, having been granted an extension of time within which to file objections, the Petitioner, through counsel, on October 10, 2003, filed objections to the original Report and Recommendation. Additionally, on October 10, 2003, the Supplemental Declaration of Dr. Miles Estner, as well as the Supplemental Declaration of Plaintiff's counsel, ROGER T. NUTTALL, were filed. Said objections to the original Report and Recommendation, together with the Supplemental Declarations, filed on October 10, 2003, are incorporated herein, and are attached hereto, collectively, as Exhibit "A."

Thereafter, on October 17, 2003, the Magistrate Judge's Amended Report and Recommendation was filed with the Clerk of the Central District.

On October 20, 2003, the said Amended Report and Recommendation was apparently entered on the Court's ICMS system. On October 24, 2003, the Amended Report and Recommendation was received in counsel's office, wherein counsel first became aware of the said Amended Report and Recommendation on the afternoon of Sunday, October 26, 2003.

On October 28, 2003, counsel prepared a Motion for Extension of Time to File Objections until Friday, November 7, 2003. Said request was granted by this Court by telephone notice on November 4, 2003.

Petitioner's objections relate to the proposed opinion by the Magistrate Judge that the instant Petition is "untimely and should be dismissed," and that,"Petitioner is not entitled to equitable tolling because she has not met her burden of showing that mental illness or other disability was the 'but for' and proximate cause of her untimeliness and that her mental illness rendered her and her counsel incapable of filing a habeas petition before the statute of limitations expired."

In this regard, and specifically with reference to the equitable tolling issue, the Petitioner, through counsel, does not consent to the proposed Findings of Fact or to the proposed Order.

In this case, as has been indicated earlier, the preparation of the Habeas Petition involved numerous and complex issues attendant to Petitioner's mental state and competency at the time of the incident giving rise to the criminal charges, as well as at the time of trial. These issues were, and are, of obvious significance, and as they were presented, counsel recognized their importance, as well as his inherent obligation to prepare and present a Habeas Petition which was sound and which incorporated all relevant materials, wherein all relevant issues would be fully and adequately addressed.

Categorically, it remains the position of counsel that the Petitioner's mental deficiencies and mental incompetency, which endured through the trial itself, and thereafter, made such preparation impossible for a time, and thereafter, extremely difficult. It is counsel's belief that the issues attendant to the proceedings as have been presented in the Habeas Petition are significant and meritorious indeed. For our purpose here, counsel

additionally maintains that the case for equitable tolling as related to the limitations period propounded under the Anti Terrorism Effective Death Penalty Act, have likewise been meritoriously addressed. In this latter regard, it is respectfully submitted that the Magistrate Judge's findings relative to the equitable tolling issue appear untenable under the circumstances. Certainly, such findings do not promote the interests of justice in a case as important as the instant one.

In short, counsel proposes that equitable tolling does apply in this case, under the facts and circumstances attendant to the case, and that this Court should be allowed to proceed to address the meritorious issues presented in the original Habeas petition.

A chronological summary may be helpful here. As the Magistrate has indicated, it was in late 1996 where the Petitioner began to become somewhat lucid, and where she was able to finally begin to communicate with counsel respecting issues attendant to the trial. She continued to become somewhat more lucid in this regard through 1997, and it was in early 1998 that counsel was able to realize (based in part upon communications with the Petitioner) that there existed significant issues attendant to unconsciousness, as well as insanity. It was during that time, in early 1998, that Dr. Miles Estner, a Forensic Psychiatrist, was retained to advise counsel as to these issues.

At the time that Habeas counsel and Dr. Estner first were able to visit the Petitioner at her custodial facility on May 13, 1998, the Petitioner was "psychotic paranoid" wherein she refused to be examined by Dr. Estner. Ultimately, the Petitioner did consent to visiting with Dr. Estner, and Dr. Estner was ultimately able to render an opinion. Dr. Estner last visited the

Petitioner on August 27, 1998.

Collaterally, it needs to be noted here that the Court has reminded counsel of statements made in previous filings, wherein the Court suggests that counsel is now "retreating" from earlier statements in terms of taking "inconsistent positions" within the Doctrine of "judicial estoppel." Counsel respectfully disagrees.

The Magistrate has pointed out that counsel believed that it was in late 1997 that the Petitioner's mental condition was such that she began to be able to assist in her defense. Obviously, this was, and has been, counsel's opinion, which must be recognized truly for what it actually is... an honest but lay observation by counsel, and not a definitive psychiatric or medical diagnosis.

The Magistrate also reminds counsel of counsel's assertion, from the records, opinions, etc., that Petitioner was incompetent to assist in her own defense, assist counsel in the preparation of the Petition for Writ of Habeas Corpus, much less understand and undertake the preparation of the a Petition of Writ of Habeas Corpus until Mid 1998, at the earliest.

Unfortunately, it was at that point that the Magistrate concludes, by way of severe "quantum leap," so to speak, that as a matter of fact, in Mid-1998, the Petitioner suddenly became fully competent. In other words, the Court erroneously attributes counsel's lay opinion to mean that as of Mid-1998, the Petitioner had indeed become fully competent wherein she was fully able to participate competently in the process. This is not what counsel said. That which counsel has said, and which has been re-affirmed in subsequent Declarations, is that it was at about that time when the Petitioner's previous incompetency began to resolve somewhat, wherein she could participate in a manner

which, for want of a better description, had the "semblance" of competency. Most important, counsel did not, as the Court suggests at Page 16, Line 22, state that the Petitioner was in fact sufficiently competent to assist counsel in the preparation of the petition. This conclusion on the part of the Court presupposed and assumed (without evidence) that remarkably, there came a certain day when the Petitioner suddenly became competent. Clearly, under the circumstances attendant to this case, not the least of which is Dr. Estner's expert opinion, as well as the lay observations of competent and respected counsel, this opinion by the Magistrate Judge runs contrary to common sense, logic and expert observation.

Further, the Magistrate Judge's assertion that the Court had "liberally construed as of July 1, 1998, that Petitioner was sufficiently mentally competent to assist in the preparation of the petition," manages to wholly ignore the expert opinion by Dr. Estner based upon his having visited with the Petitioner and having reviewed her records during relevant times that "it is highly unlikely that the Petitioner, during the years 1998 and 1999, based upon her incompetency, lacked the consistent ability to rationally assist Mr. Nuttall in the preparation of her Habeas Corpus Petition." Dr. Estner pointed out that during this particular period, the Petitioner was not being treated for her Post-Traumatic Stress Disorder, and her propensity for Dissociation, wherein Dr. Estner opined that this set of events "would predictably render her incommunicative regarding the topics necessary to the preparation of her Habeas Corpus Petition."

In this latter regard, and by way further lay observation on

the part of counsel herein, it is general knowledge that a Post-Traumatic Stress Disorder which essentially goes untreated is oftentimes manifested by persistent avoidance (by the patient) of thoughts, feelings or conversations associated with the cause of the stress disorder, wherein such persons persist in avoiding any recollections of the trauma, and wherein there oftentimes exists an actual inability to recall important aspects of the trauma.

In the final analysis, there exists no specific formula, as such, by which to determine whether the concept of equitable tolling should apply. Counsel would like to believe that his own assertions and those of his expert witness would be accepted by the Court without skepticism as representing the honest and true observations as recalled and reported. It is respectfully submitted, if indeed these factors and circumstances are given appropriate face value, that this Court should find that there did in fact exist extraordinary circumstances beyond the Petitioner's control which made it impossible for her counsel to properly and fully file the claims on time. The Court should further find that a substantial showing of mental incapacity has been documented supporting this position. Of course, in order to reach this decision, counsel recognizes that this Court may well be forced to discard its earlier suggestion that Petitioner's counsel was somehow wily and/or crafty in engaging in "nothing more than back peddling," as well as its suggestion that counsel perhaps did not appreciate the "dignity of these judicial proceedings." Perhaps most important in this regard, this Court would have to discard its clearly unwarranted finding that Dr. Miles Estner, a highly qualified forensic psychiatrist (See attached Curriculum Vitae, marked Exhibit "B"), has no credibility in terms of the

assertions which were made by him respecting his examination of the Petitioner at relevant times and as related to the timeliness of the preparation of the Habeas Petition.

In conclusion, the fact of the matter is that Petitioner has shown facts which comprise "extraordinary circumstances" under applicable case law. In this regard, it is felt that the Petitioner has met her burden in that her mental incapacity and disability rendered her, to a significant extent, incapable of being able to appropriately assist counsel in the filing of the Habeas petition at any time prior to the time that it was actually filed.

THEREFORE, it is respectfully urged that the Motion to Dismiss be denied, and that this Petition be viewed, under the facts and circumstances of the instant case, as having been timely filed. Clearly, the interests of justice, as well as the pursuit of justice in criminal proceedings, would be best served by allowing the instant Petition to proceed upon the most significant merits attendant thereto.

DATED: November 6, 2003.

Respectfully Submitted,
NUTTALL & COLEMAN

"s/ ROGER T. NUTTALL"
By: _____
ROGER T. NUTTALL
Attorneys for Defendant
OMAIMA NELSON

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ATTORNEYS FOR Petitioner
OMAIMA NELSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

SUPPLEMENTAL DECLARATION OF ROGER T. NUTTALL

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.

I, ROGER T. NUTTALL, declare that:

1. I am an attorney licensed to practice law in the State of California, and that I am the attorney of record for the Petitioner, OMAIMA NELSON, herein;

2. The instant Supplemental Declaration is intended to respond to conclusions made in the proposed Report and Recommendation of United States Magistrate Judge, VICTOR B. KENTON, dated August 27, 2003;

3. Reference in this regard is made to an earlier Declaration of ROGER T. NUTTALL dated September 21, 1999, said Declaration having been marked as Exhibit "A" to Petitioner's Response to the State of California's Motion to Dismiss filed with this Court on or about April 20, 2003;

4. As counsel for the Petitioner, your Declarant has always maintained that the Petitioner herein was incompetent to assist in her own defense and to assist counsel in any meaningful way in the preparation of the Petition for Writ of Habeas Corpus, much less understand and undertake the preparation for a Petition for Writ of Habeas Corpus, until at least Mid-1998, at the very earliest;

5. In the Honorable Magistrate Judge Kenton's proposed Report and Recommendation, at Page 16, Line 4, Dr. Miles Estner's professional opinion as to the Petitioner's mental state at the time of the offense is acknowledged; however, the court noted that Dr. Estner failed to render any opinion as to "whether Petitioner was, at any time following judgment, incapable of assisting habeas counsel in preparing the petition." Magistrate Judge Kenton goes further at Line 21, on Page 18, to suggest that "it is reasonable to conclude...that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition."

6. Upon receiving the proposed Report and Recommendation, counsel sought an extension of time within

which to file objections to the Magistrate Judge's Report and Recommendation. Said Motion was graciously granted until October 15, 2003;

7. For these purposes, notwithstanding the fact that Dr. Miles Estner's professional assistance was not originally sought for purposes attendant to the issue of "equitable tolling," your Declarant did, as counsel for the Petitioner, contact Dr. Estner to address this issue;

8. Dr. Estner has been able to recover his file; and based upon his understanding of the issues, he has addressed the issue of Petitioner's competency during the applicable time period prior to the original filing of the Petition for Writ of Habeas Corpus, wherein he has concluded that, in his professional opinion, the Petitioner was "trial-incompetent" during 1998, and foreseeably into 1999, in that she lacked the consistent ability to rationally assist counsel in preparing her case;

9. Dr. Estner has further stated that, in his professional opinion, the Petitioner was not able to rationally assist counsel during the interval of May to August of 1998, and that absent necessary treatment (which was not sought or given) it was likely that she remained incompetent into the year 1999;

10. Your Declarant, as counsel for the Petitioner, has also consistently maintained that it is, and has been, counsel's belief that even at the time of the filing of the Petition for Writ of Habeas Corpus, the Petitioner still exhibited significant signs of mental incompetency which interfered with the preparation of the Habeas Petition;

11. Indeed, your Declarant believes, to this date, that Petitioner's ability to continue to assist in her legal matters is

substantially hindered by such continuing mental difficulties;

12. Your Declarant can attest further to the fact that he has observed in his continuing dealings with the Petitioner that there has been no sudden or unexpected restoration of competency, even to this date;

13. In this latter regard, your Declarant cites to the Declaration of the Petitioner dated May 2, 1999, heretofore filed as Exhibit "B" to Petitioner's Response to the State of California's Motion to Dismiss, also filed in this Court on or about April 20, 2003, wherein Petitioner states that as of that date, she still did not feel that she understood what actually happened in terms of the facts of the case giving rise to the prosecution, and that as of that date, she still did not feel that she really understood what was going on in terms of the trial itself;

14. For these reasons, your Declarant believes that the extraordinary and truly equitable concept of "equitable tolling" should be afforded the Petitioner, in that her mental illness and/or incompetency directly and proximately contributed to the purported untimeliness wherein such disability rendered her counsel incapable of properly filing the Petition for Writ of Habeas Corpus prior to the expiration of the statute of limitations.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct except as to those matters stated upon information and belief, which I believe to be true, and that this Declaration was executed on October 13, 2003, at Fresno, California.

"S/ROGER T. NUTTALL"

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ATTORNEYS FOR Petitioner
OMAIMA NELSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
* * * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

SUPPLEMENTAL DECLARATION OF DR. MILES ESTNER

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.) ss.

I, DR. MILES ESTNER, declare that:

1. I am a clinical psychiatrist licensed to practice medicine and surgery in the State of California; Board-Certified in Psychiatry, Forensic Psychiatry, and a Board-Certified Medical

Examiner;

2. Reference is herein made to my earlier Declaration dated August 20, 1999, which, I understand, was attached to a previous legal pleading filed by counsel for Petitioner, and which is attached hereto as Exhibit "A";

3. Recently, I was contacted by Attorney, ROGER T. NUTTALL, of the law offices of NUTTALL BERMAN ATTORNEYS of Fresno, California, wherein I was asked to review my file in an effort to form a professional opinion as to whether or not the petitioner (OMAIMA NELSON) was competent to assist counsel in the preparation of the Petition for Writ of Habeas Corpus subsequent to Mid-1998;

4. I have reviewed my file, and my recollection of this case; and in response to Mr. Nuttall's request, I wrote to him on October 6, 2003, wherein I rendered my professional opinion. A photocopy of the said October 6, 2003, letter is attached hereto and marked as Exhibit "B" and incorporated herein, in full, by reference;

5. In essence, in my professional opinion, it is highly likely that the Petitioner, during the years 1998 and 1999, based upon her incompetency, lacked the consistent ability to rationally assist Mr. Nuttall in the preparation of her Habeas Corpus Petition. In this regard, during the said period of time, absent necessary treatment which I understand was not given, she continued to suffer from post-traumatic stress disorder, with a propensity for Dissociation, which would predictably render her incommunicative regarding the topics necessary to the preparation of her Habeas Corpus Petition.

WHEREFORE, I declare, under penalty of perjury under

the laws of the State of California, that the foregoing Declaration, including my letter dated October 6, 2003, which is included in its entirety by reference, is true and correct in my professional opinion, and that this Declaration was executed on October 11, 2003.

"s/MILES ESTNER"

EXHIBIT A

DECLARATION OF DR .MILES ESTNER

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.) ss.

I, DR. MILES ESTNER, declare that:

1. I am a clinical psychiatrist licensed to practice Medicine and Surgery in the State of California; Board-Certified in Psychiatry, Forensic Psychiatry, and a Board-Certified Medical Examiner;

2. I was first contacted by Roger T. Nuttall on or around March 24, 1998 for, the purposes of examining Petitioner Omaima Nelson and giving him my professional opinion as to her mental and physical health. I was retained by Nuttall Berman Attorneys formally for these purposes on March 30, 1998;

3. I was provided with access to all pertinent records and materials possessed by Nuttall Berman Attorneys regarding this case at the time that I was retained;

4. In my professional opinion, Petitioner Omaima Nelson suffers from a Dissociative Disorder or a form of Post-Traumatic Stress Disorder of which Dissociation is a cardinal symptom. This results from her lifetime of abuse, beginning with sexual molestation as a young child, followed by ritual female circumcision without anesthesia, compound by additional sexual molestation and abuse in her native Egypt and in America, and culminating in physical, emotional, and additional sexual abuse by William Nelson, her husband at the time of the incident;

5. Petitioner Omaima Nelson did psychotically dissociate as a result of William Nelson's continuous abuse of her in their

home following a trip to Arkansas which was marked by substantial verbal, physical, and sexual abuse. The psychosis involved a grossly altered perception of reality with an altered level of consciousness. The Dissociation was a departure from reality and was accompanied by altered levels of consciousness, such as is seen in hypnotic states or with the use of Phencyclidine, a clinical anesthetic, also known as a dissociative agent. Further substantiation of Petitioner's level of unconsciousness at the time of the incident are the bizarre ritual-like acts which she performed on her husband's body following his killing which were carried out over a period of several days;

6. I, accompanied by Roger Nuttall, first visited Petitioner Omaima Nelson on May 13, 1998. At that time she appeared to be psychotically paranoid and refused to be examined by me;

7. I next saw Petitioner on May 21, 1998. I was able to examine her at that time. However, despite having, given releases to the proper facility officials and having received assurances to the contrary, I was denied access to her prison medical records;

8. Petitioner Omaima Nelson's prison medical records are essential to a proper diagnosis of her both mentally and physically;

9. I next saw Petitioner and examined her for a second time on August 27, 1998 at Valley State Prison and was finally given the additional medical records;

10. It is my professional opinion, to best medical and scientific certainty, that Omaima Nelson was, at the time of the offense, clinically unconsciousness due to her dissociation;

11. It is also my opinion, to best medical and scientific certainty, that Omaima Nelson was, at the time of the offense, as a result of her mental illness, not able to know or understand the

nature and quality of her acts; nor was she capable of distinguishing right from wrong in her psychotic, dissociated state;

12. Having examined Ms. Nelson and reviewed the transcript of her testimony, as well as reviewed contemporaneous medical and psychiatric records from the jail, I also opinion that Ms. Nelson, as a result of her mental illness, could not understand the nature and purpose of the legal proceedings being taken against her; nor was she able to cooperate rationally with defense counsel in preparation and presenting her defense, e.g. close to the trial date she was observed smearing her own face with red jello, insisting that it was a facial treatment.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this. Declaration was executed on August 20, 1999, at Fresno, California.

"s/Dr. Miles Estner"
Dr. Miles Estner

EXHIBIT B

S. MILES ESTNER, M.D.
FORENSIC MEDICINE & PSYCHIATRY

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October 6, 2003

Mr. Roger T. Nuttall
Attorney at Law
Nuttall, Berman, & Associates
2333 Merced Street
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RE: Case No. SA CV 02-00615-CAS (VBK)
NELSON, O. v. Warden Mitchell
Writ of Habeas Corpus
Forensic Consultation

Dear Mr. Nuttall,

This document is respectfully submitted following your request that I analyze Ms. Nelson's mental competency to assist Counsel during these proceedings.

IDENTIFICATION: Ms. Nelson, originally at Chowchilla State Prison, is now incarcerated at the Valley State Prison, Chowchilla, California, serving a 25 year sentence for Second Degree Murder. I examined her at the Prisons on May 13, 1998, May 21, 1998, and August 27, 1998. The results of my

evaluations of her as well as extensive document review led to several conclusions, including that she was incompetent to stand trial during her original proceedings in Orange County. Now comes the question of her trial competency around the time of these examinations.

OPINION: In my professional opinion, Ms. Omaima Nelson WAS Trial-Incompetent during 1998, and foreseeably into 1999. She specifically lacked the consistent ability to rationally assist Counsel in preparing her case. I hold this opinion for the following reasons.

Ms. Nelson, on the opinion of several examining doctors, including myself, suffers from Post-Traumatic Stress Disorder, with a propensity for Dissociation.

She qualifies for the diagnosis by having been through extreme experiences that would expectedly leave one traumatized.

Ms. Nelson has manifested required symptoms of dissociation, hypervigiliance, re-experiencing phenomena, and most pertinently, avoidance of situations which necessitate dealing with those events.

Predictably, due to her diagnosis, Ms. Nelson would manifest difficulty and even inability to discuss details of her past as a manifestation of avoidance.

Her difficulties in this area were manifested during my interviews of her been May and August of 1998.

At the first interview of May 13, 1998, Ms. Nelson was able to participate in the examination at all.

Subsequent interviews of May 21, 1998, and August 27,

1998, were more productive, but the content of those interviews contained substantial avoidance of sensitive areas, with a strong tendency on Ms. Nelson's part to keep the topics on current developments, rather than details of past experience.

She also manifested an avoidance of psychiatric treatment in Prison, treatment which could help resolve her symptoms and allow for freer flow of information pertinent to her Writ.

As a psychiatrist with training and experience in facilitating rapport and information exchange with traumatized or paranoid patients, given the challenges I experienced in helping Ms. Nelson share her past, I extrapolate to Counsel's having serious similar. difficulties, indicating Ms. Nelson's inability to rationally assist Counsel in her proceedings.

SUMMARY: In my professional opinion Ms. Omaima Nelson WAS NOT able to rationally assist Counsel during the interval of May-August, 1998. Absent necessary treatment, it is likely that she remained incompetent into the year 1999.

It remains my opinion that Omaima Nelson was Incompetent to Stand Trial during her original proceedings.

She continued to suffer from a mental condition, Post-Traumatic Stress Disorder, which would predictably render her incommunicative regarding topics necessary to her Petition.

Specifically, avoidance of sensitive areas was clearly manifested in:

Inability to participate in the first interview;
Avoidance of and inability to discuss sensitive areas during subsequent interviews, and;

Resistance to psychiatric treatment available to her which

might reduce her symptoms and ease sharing of pertinent information.

Thank you for having requested my opinion :in this matter. I hope that these efforts are helpful to the Court in its deliberations.

Sincerely

"s/S. Miles Estner, M.D."
S. Miles. Estner, M.D.

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Private Practice, Clinical and Forensic Psychiatry

Psychiatric Training

University of California, San Francisco
Fellowship in Forensic Psychiatry, 1993 - 1994
Recipient, U.C.S.P. Medical Research Award, 1994
University of California, San Diego
Residency in General Psychiatry, 1990 - 1993
Jonas Rappeport Fellow in Psychiatry and the Law, 1992 - 1993

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Diplomate and Fellow, American College of Forensic Examiners
Diplomate, American College of Forensic Medicine
Diplomate, National Board of Medical Examiners
Licensed Physician & Surgeon, Medical Board of California, Illinois, Washington, Oregon

Medical Education and Training

University of Pittsburgh School of Medicine, M.D.. 1984
Addison H. Gibson Foundation Scholar, 1982 - 1984
National Institutes of Health, Bethesda, Maryland,
Fall Quarter, 1983
The Royal Infirmary of Edinburgh, Edinburgh, Scotland,
Winter , 1984
The Cleveland Clinic, Cleveland, Ohio, Spring Quarter, 1984
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Internship, Residency. and Chief Residency in Medicine and
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Undergraduate Education

Haverford College, Philadelphia, Pa, B.A. with Honors, 1980
Magill-Rhoads Scholar, 1976 - 1980
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References

1) The Honorable Michael L. Duffy
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to the U.C.S.F. School of Medicine, Fresno-Central San Joaquin Medical Education Program, Department of Psychiatry, May, 1994; Recipient, 1993-94 U.C.S.F. Medical Research Award

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17) Estner, S. Miles. M.D., Instructor, Introductory Seminar Series in Psychiatry and the Law, U.C.S.F. School of Medicine, Fresno-Central San Joaquin Valley Medical Education Program

Department of Psychiatry, January - April, 1995

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION FILED AUGUST 27, 2003.

Dated October 13, 2003

Petitioner, OMAIMA NELSON, by and through her counsel of record, ROGER T. NUTTALL, hereby submits objections to the Report and Recommendation of the United States Magistrate Judge filed on August 27, 2003.

On September 15, 2003, Petitioner, through counsel, moved for an extension of time within which to file objections to the Magistrate Judge's Report and Recommendation.

On September 22, 2003, an order was filed graciously allowing counsel for the Petitioner 30 days from September 15, 2003, until October 15, 2003, to file such objections.

Petitioner's objections respectfully relate to the opinion by the Magistrate Judge that the "Petitioner is not entitled to equitable tolling because she has not met her burden of showing that mental illness or other disability was the 'but for' and proximate cause of her untimeliness and that her mental illness rendered her and her counsel incapable of filing a habeas petition before the statute of limitations expired."

In this regard, as indicated fully in earlier pleadings, the instant case, in terms of the preparation of the habeas petition, involved numerous and complex issues attendant to the Petitioner's mental state and competency at the time of the incident giving rise to the charges, and at the time of trial. Of course, given these circumstances, counsel wished to and was obligated to prepare a habeas petition that was sound and which incorporated all relevant materials and which fully addressed all issues. The fact of the matter is that the Petitioner's mental deficiencies and mental incompetency which has endured since the trial itself, made such preparation impossible for a time, and thereafter, difficult, at best.

In this regard further, the Magistrate Judge has concluded at Page 18, at Line 21, that "it is reasonable to conclude, therefore, that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition." Respectfully, Petitioner's counsel objects to that

finding, while recognizing that the record, as it has stood heretofore, may well have allowed the Magistrate Judge to make such an assumption.

In this specific latter regard, attached hereto is the Supplemental Declaration of counsel wherein counsel maintains that even at the time of the filing of the Petition for Writ of Habeas Corpus, Petitioner still exhibited signs of mental incompetency which significantly interfered with the preparation of the petition. Counsel, in his Declaration, also goes on to assert that the extraordinary and equitable concept of "equitable tolling" should be afforded the Petitioner in this instance since her mental illness and/or mental incompetency directly and proximately contributed to the purported untimeliness, wherein such disability rendered counsel incapable of properly filing the petition prior to the date when it was actually filed on September 21, 1999.

Further, reference is made to the Supplemental Declaration of Dr. Miles Estner which is attached hereto and wherein Dr. Estner, in his professional opinion, states that it is highly likely that the Petitioner in this case, during the years 1998 and 1999, based upon her mental incompetency, lacked the consistent ability to rationally assist counsel in the preparation of the habeas petition. Indeed, Dr. Estner, under penalty of perjury, notes Petitioner as having suffered from post-traumatic stress disorder with dissociation, which would predictably render her incommunicative, during this period of time, regarding the topics necessary to the full and complete preparation of the petition.

It is respectfully asserted that the Doctrine of Equitable Tolling as related to the AEDPA limitation period should be afforded Petitioner herein based upon a demonstration that "extraordinary

circumstances" exist which justify such tolling. See Calderon v. United States District Court (Kelly) 163 F.3d 530 (9th Cir. 1998).

Indeed, the equitable tolling relates to mental difficulties which easily comprise "extraordinary circumstances" which were beyond the Petitioner's control which made it impossible to properly file the petition at any time sooner than it was actually filed. See Calderon v. United States District Court (Beeler) 128 F.3d 1283 (9th Cir. 1997).

In conclusion, it respectfully submitted that Petitioner herein has now met her burden in that her mental incapacity and disability rendered her incapable of being able to assist counsel in filing the habeas petition at any time prior to the time when it was actually filed. Therefore, it is respectfully submitted that the Motion to Dismiss be denied, and that the Petition be viewed, under the facts and circumstances of the instant case, as timely pursuant to the Doctrine of Equitable Tolling as related to the limitations period propounded under the Anti-Terrorism Effective Death Penalty Act.

DATED: October 13, 2003.

Respectfully Submitted,
NUTTALL BERMAN ATTORNEYS
"s/ROGER T. NUTTALL"
By: _____
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

PETITIONER, OMAIMA NELSON'S RESPONSE TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS THE WRIT OF HABEAS CORPUS

Filed April 21, 2003

Petitioner, Omaima Nelson, herein responds to the State of California's Motion To Dismiss the Writ of Habeas Corpus as time-barred.

Petitioner contends that the Petition is timely filed pursuant to 28 U.S.C. § 2244(d)(2). Petitioner further contends that extraordinary circumstances, as set forth in the original habeas corpus filing in the Central District Court, as well as those issues addressed in previous State of California habeas filings, constitute adequate justification for tolling of the AEDPA.

BACKGROUND

Herein, the Petitioner sets forth a chronology of specific dates and activities, supported by the Declaration of Roger T. Nuttall, attorney for the Petitioner (Exhibit A); Omaima Nelson, Petitioner, (Exhibit B); Miles D. Estner, MD., consulting physician, (Exhibit C); and Nancy Kaser-Boyd, PhD., noted author, and recognized mental health expert in the filed of "battered women syndrome", (Exhibit D).

Nelson was charged on April 21, 1992. The trial began on December 2, 1992, and the jury returned its verdict on January 12, 1993. Sentencing occurred on March 12, 1993, following a denial of a motion for a new trial. Petitioner then obtained appointed appellate counsel shortly thereafter. Petitioner never met with appellate counsel and only spoke with him over the telephone on two or three occasions. Hence, Petitioner had a minimal participation in the appellate process and was never informed by appellate counsel that she could file a Writ of Habeas Corpus concurrently with any of her appeals. Moreover, she had no reason to know of such a possibility due to her minimal education, lack of legal knowledge, and chiefly her psychotic mental condition. (Exhibit C [Declaration of Dr. Miles Estner, pages 1-4]; see also Exhibit B [Declaration of Omaima Nelson, page 1].) Appellate counsel filed an appeal with the Court of Appeal of the 4th District on March 1, 1994. The Appellate Court released its opinion on February 28, 1995. Thereafter, an appeal

was filed with the California Supreme Court on April 6, 1995, which was followed by that Court's denial of certiorari on May 31, 1995. Following the denial of certiorari, Petitioner obtained present habeas counsel on August 5, 1995.

For the remainder of the year 1995, present habeas counsel for Petitioner, together with a member of said counsel's support staff, reviewed the transcripts of the trial, which were lengthy, as well as the appellate briefs and other materials relative to the appeal of this case. Present counsel began the process of reviewing the case file, performing background legal research, meeting with Petitioner, and attempting to gather all pertinent records.

Initially, present counsel for Petitioner began researching the remedies of Coram Nobis and Habeas Corpus. Counsel also began researching certain aspects of the law as related to problems peculiarly related to Petitioner, e.g. sexual mutilation as it related to her having been sexually mutilated as a child in Egypt and her subsequent physical and sexual abuse at the hands of her late husband.

Several interviews were completed with Petitioner during the latter part of 1995. These interviews were difficult due to Petitioner's particularly disorganized mental state and counsel's difficulty dealing with Petitioner on a personal communication level. Because of Petitioner's inability to fully cooperate or communicate with present counsel due to her then-existing level of psychosis, counsel had further problems trying to elicit facts from Petitioner with regard to the case and trial.

Throughout this time period, counsel's office was actively trying to obtain mental health records from Orange County, as well as hospital records dealing with Petitioner's mental state. However,

counsel's initial efforts were somewhat stymied by inaction on the part of the agencies possessing the pertinent records.

The review of the documentation that had thus far been received continued into the early part of 1996, and it was at that time that counsel began legal research regarding the issues that had been raised on appeal. Meanwhile, counsel continued to talk to experts concerning the genital and sexual mutilation issues, as well as review the medical records which had thus far been obtained. Counsel further examined the appellate issues through a review of the trial transcripts and continued to seek records from the Orange County Superior Court. Counsel's office did receive additional records from the Orange County Superior Court in late February, 1996.

At that time, present counsel began to examine pretrial matters such as pretrial motions and matters attendant to that. Counsel initially focused on the idea of re-litigating all of the issues related to the possible plea of not guilty by reason of insanity, which, it was felt, should have been asserted in this case. Counsel further examined the issue of the insanity plea in relation to a Petition for a Writ of Habeas Corpus. All the while, present counsel continued to visit periodically with Petitioner to see if her mental state had improved enough to a point where she could be able to relate her recollection of the circumstances of the case and/or her recollection of the trial.

While present counsel felt that Petitioner was getting better during early 1996, there were certain difficulties still present that were simply unable to overcome in terms of being able to communicate with Petitioner.

By the Summer of 1996, present counsel had discerned what issues needed to be developed; namely, the insanity issue, the delay of the jury deliberations, as well as the competency of counsel issues.

Pursuant to this end, counsel's office telephoned Mr. Thomas Mooney at the Public Defender's office in Orange County to obtain his file. Counsel was, at that time, particularly interested in what type of medical and psychiatric records Mr. Mooney had in his possession.

In October of 1996, counsel traveled to Orange County to meet with Mr. Mooney and to consult with him, as well as to meet and consult with Dr. Nancy Kaser-Boyd, in order to ascertain her thoughts on the mental issues involved in this case. Present counsel also met with Dr. Teresa Farjalla who had been a treating doctor while Petitioner was in custody, awaiting and during trial.

During present counsel's meeting with Mr. Mooney, it was requested that Mr. Mooney immediately forward the psychiatric and medical records. He represented that he would send all pertinent records regarding Petitioner such that present habeas counsel relied on those assurances.

In a subsequent meeting with Petitioner, counsel was able to gather enough information from Petitioner so as to be able to contrast what Petitioner was able to remember, and not remember, with the trial transcript. This, coupled with present counsel's discussions with Dr. Kaser-Boyd, convinced counsel that the biggest issue in the case was the failure to assert the insanity defense. At that time, counsel also wondered whether an unconsciousness defense had been asserted, that particular aspect was not then pursued further.

That same month, in October 1996, present counsel's office wrote again to Mr. Mooney requesting Petitioner's medical and psychiatric records, as well as any support respecting the waiver of the insanity defense. Present counsel also began to re-examine the transcript in light of the issues that counsel had developed at that time.

Additionally, counsel began speaking with the appellate attorney concerning certain appellate materials, and inquiring as to what other issues he thought may be available.

In December of 1996, counsel's office again wrote to Mr. Mooney specifically reminding him, for the second time, that Petitioner's medical, psychological, and psychiatric reports, were needed together with any records respecting her waiver of the insanity defense. As of this time, trial counsel had not sent any of the requested records.

At approximately this same time, late 1996, Petitioner started to became more lucid; and during meetings with her, present counsel and the Petitioner were able to talk somewhat more about her recollection of whether or not she waived the insanity defense and what she remembered of the circumstances of that waiver.

It became clearer and clearer to counsel that Petitioner was, during the trial of her case, effectively "excluded" from what was transpiring in the most important matters of the trial, and that matters were being handled on her behalf, without her approval and in her absence, or both.

During the early part of 1997, counsel continued to work on the preparation of the Petition for Writ of Habeas Corpus, but by May of 1997, counsel's office still had not received the medical, psychological, or psychiatric records and reports which had been requested, nor had the information relative to the purported waiver of the insanity defense been received. On May 29, 1997, counsel's office again requested the records from trial counsel.

In July of 1997, present counsel's office did finally receive those materials, and thereafter, a review of those records was commenced.

Following a review of those materials, counsel discovered that

there were additional failures on the part of trial counsel to pursue two very important issues; namely, the issue of the unconsciousness defense and the issue of Petitioner's incompetency to stand trial. Through further review, present counsel also discovered that the unconsciousness jury instruction had apparently been withdrawn by Mr. Mooney during the trial. Counsel then began researching the law regarding unconsciousness and came to believe that such was indeed a very appropriate issue based upon the facts of the trial as derived from the trial transcripts. Also, in approximately September, 1997, based upon what present counsel was learning from Petitioner from discussions with her, (she was starting to become much more lucid), present counsel then began considering the fact that Petitioner had most likely also been incompetent to stand trial at the time of trial and had really not known what was occurring around her at that time.

Subsequently, counsel again flew to Los Angeles and on September 19, 1997, met with Dr. Nancy Kaser-Boyd, wherein, they discussed both the insanity and unconsciousness defenses. Dr. Kaser-Boyd affirmed that both issues did, in her opinion, constitute viable defenses, which in her opinion, should have been asserted.

In October of 1997, counsel sent to Dr. Kaser-Boyd relevant reports and again pursued the purported waiver of the insanity defense by writing a fifth letter to Mr. Mooney requesting such waiver, as well as any other materials that he had concerning evaluations of Petitioner by Dr. Nancy Kaser-Boyd from the time of the trial.

Thereafter, counsel's office received what may have been the purported waiver of Petitioner's insanity defense, which was, in fact, merely a waiver of her right to be present.

At that same time, present counsel came to the realization that the

truly most significant issue in the case was the issue of unconsciousness, in addition to the insanity issue, and at that approximate time significant work on the issue of unconsciousness was commenced. Present habeas counsel, at this time, wanted to obtain additional expert support. Towards this end, in early 1998, counsel was able to locate Dr. Miles Estner, a medical doctor and a forensic psychiatrist. Dr. Estner was formally retained on March 24, 1998, to review the entire case including all of the records in order to advise counsel on the viability of the unconsciousness and insanity defenses. (Exhibit C, [Declaration of Dr. Miles Estner], pages 1-4].)

Continuing in 1998, Dr. Estner proceeded to review all of the records that present counsel's office had by then acquired. Dr. Estner that he needed to see Petitioner's prison medical file, as well as visit her in prison. On April 1, 1998, present habeas counsel sent a letter along with two letters of authorization to Petitioner which gave authorization for counsel and Dr. Estner to visit Petitioner at the Chowchilla Women's Facility where Petitioner was then confined. Petitioner received these letters of authorization and subsequently signed them on April 7, 1998. These signed letters of authorization were faxed by counsel's office to the appropriate contact at the Chowchilla Women's Facility on April 15, 1998. A meeting was then set up through the same contact at the Chowchilla Women's Facility for May 13, 1998. At the request of this contact at the Prison, additional background information was furnished by Dr. Estner on May 11, 1998, for the purpose of obtaining visitation privileges.

Present counsel along with Dr. Estner visited Petitioner on May 13, 1998. Petitioner at this time appeared to be psychotically paranoid and refused to be examined by Dr. Estner. The next examination by Dr. Estner occurred on May 21, 1998. Petitioner

cooperated fully with Dr. Estner at this time. However, despite having given releases to the proper facility officials and the officials' promises to the contrary, Dr. Estner was denied access to Petitioner's records as possessed by the facility's medical staff. These records were essential to Dr. Estner's determination of Petitioner's mental health as it related to Petitioner's heart condition and physical health in general. Present counsel attempted to have Dr. Estner visit Petitioner in early July but, due to administrative difficulties on the part of the facility, was only able to schedule a follow-up interview for July 16, 1998.

However, on that date, July 16, 1998, Petitioner had been transferred to another prison, Valley State Prison also in Chowchilla, California, with no reason given for the transfer. On July 20, 1998, pursuant to the new facility's administrative requests, present counsel's office faxed a request for permission for Dr. Estner to examine Petitioner at the Valley State facility. Counsel also had to send information to the new facility, despite having sent the same information to the former facility, in order to allow for visits between present habeas counsel and Petitioner. Having received no response to the request, present counsel again faxed a request on August 19, 1998, for permission for Dr. Estner to examine Petitioner. Thereafter, an appointment was arranged for Dr. Estner to examine Petitioner on August 27, 1998. Dr. Estner then examined Petitioner for the second time on August 27, 1998, at Valley State Prison and was finally given Petitioner's additional medical records. Dr. Estner then submitted his findings to present habeas counsel on October 5, 1998.

Dr. Estner ultimately came to the conclusion during the mid-part of the year 1998 that, more important than the failure to assert the

insanity defense, was the failure to assert the unconsciousness defense since it was particularly viable. Dr. Estner also concluded that, perhaps equally as important as the unconsciousness defense, was the failure to request on the part of trial counsel, and the failure to conduct on the part of the court, a Penal Code Section 1368 competency hearing. In Dr. Estner's opinion, Petitioner was both mentally and physically incompetent to stand trial.

Since the latter part of 1998, present habeas counsel's office had been trying to perfect the entire Petition for Writ of Habeas Corpus as regards state court proceedings. This process has included a review of the entire case file and a thorough examination of all possible relevant legal issues in order that the Petition be ultimately complete and adequate. In this regard, present counsel has explored additional issues, including, but not limited to, cultural defenses, the possible error with reference to not providing Petitioner with a court certified interpreter, but these, among other issues, which have been considered, have been discarded.

Approximately during middle to late 1998, based upon a review of the complete case, as well as a review of Dr. Estner's analysis, present counsel concluded that the most viable aspects of the case dealt with Petitioner's unconsciousness defense, as well as the serious question of her competency to stand trial, and that counsel has since directed his efforts assiduously toward those issues.

Petitioner previously applied for a Writ of Habeas Corpus to the Orange County Superior Court on September 21, 1999. This Petition was denied on October 20, 1999, by the Honorable Kazuharu Makino.

In the two-page Minute Order of October 20, 1999, summarily denying the Petitioner's request for habeas relief, the Superior Court

grouped Petitioner's Nine (9) specific issues into two (2) basic categories: (l) judicial error, and (2) ineffective assistance of counsel. The Court then briefly noted that several of the allegations of judicial error could have been raised on appeal, but were not; and then simply chose not to address these very serious judicial error issues raised by the Petitioner in the habeas brief. These judicial errors, as enumerated again in this petition, and thereupon expanded, are serious Constitutional

violations, and the Petitioner is seeking habeas relief in this forum.

The Petitioner also raised the issue of the "underwhelming" performance of counsel, and not only showed that the assistance provided was ineffective, but clearly demonstrated that counsel allowed the trial to be reduced to a farce and/or a sham. The Court, in its Minute Order, indicated that the Petitioner failed to plead facts which showed that the performance fell below the required objective standard. The Petitioner again raises the issue of ineffective assistance of counsel in this original petition, and pleads specific facts as to the ineffective assistance. The prejudice caused by this ineffective assistance clearly, in and of itself, invites reversal.

On March 8, 2000, Petitioner submitted an original Petition to the Court of Appeals, Fourth Appellate District, Division Three. This original Petition, in addition to re-iterating several of the same issues raised in the Petition to the Superior Court, raised three additional issues: reversible error by failing to instruct the jury on evidence of mental disease as to the ability to form specific intent; reversible error by failing to hold a Penal Code §1368 competency hearing in light of the substantial evidence presented that the defendant was suffering from psychosis; and, inadequate instructions on the defense of the battered woman's syndrome which prejudiced the defendant.

In an unpublished opinion, filed on August 31, 2000, the Appellate Court granted, in minor part, the Petition for a Writ of Habeas Corpus, ordering that the Penal Code §12022.1 two-year enhancement be vacated. In a ruling, astounding for its brevity, given the breadth and depth of the issues raised in the petition, the Appellate Court simply stated "[I]n her recently filed Petition for a Writ of Habeas Corpus, Nelson raised numerous issues, only one of which we found might have merit". This ruling fails to address any of the other issues raised in the petition.

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On November 2001, Petitioner presented to the Supreme Court

of the State of California, an original Petition for a Writ of Habeas Corpus. This Petition was denied.

ARGUMENT

During the pendency of state collateral proceedings, the Petitioner had the burden of explaining the delay in filing the Writ of Habeas Corpus to the state courts's satisfaction. Petitioner, in state court proceedings argued that there were two cases dealing with using mental health as a defense on a collateral attack that define the limits of a satisfactory delay in such a circumstance.

The California Supreme Court, in *In re Saunders* (1970) 2 Cal. 3d 1033 [472 P.2d 921], held that a 5-year delay in seeking collateral relief was sufficiently explained where the defendant contended that his trial counsel had been ineffective in failing to raise the defense of diminished capacity and the defendant alleged that (**a**) he had only a 9th grade education and was without experience or education in law; (**b**) that there was a 4-year delay between the time that the defendant learned that his trial counsel had received medical records prior to or during the trial and the time of the collateral filing; (**c**) that even after he learned of that information he was unable to make use of it because he did not have access to his complete medical records and because he was unaware of the applicable law; (**d**) that he did not learn of the doctrine of diminished capacity until approximately 2 ½ years before the collateral filing and, immediately after learning of the defense, he assiduously sought the assistance of new counsel in securing and reviewing the medical and psychiatric records relevant to the issue; and (**e**) that the necessary medical records were not obtained until early in the year of the collateral filing when the defendant was able to obtain the services of an attorney who filed for the relief. (*Id.* at 1040-1041.)

Petitioner argued that the circumstances in the case at hand were sufficiently similar to *Saunders* so as to warrant a substantial justification for any delay. To begin, here, Petitioner has a bare high school-level education which she obtained by attending the public schools within some of the poorest areas of Egypt. Moreover, the record from her trial clearly shows that she lacked a basic understanding as to what was occurring around her, as evidenced by her testimony. The reason for this lack of basic knowledge stems from Petitioner's lack of English language skills, different ethnic and cultural beliefs and customs, and most importantly, her "deep psychosis" which she suffered from at the time of her trial. (Exhibit C, [Declaration of Dr. Miles Estner].)

Additionally, Petitioner not only lacked experience or education in law, but she also lacked the mental capacity to reason or assist habeas counsel in her defense. (Exhibit C [Declaration of Dr. Miles Estner, page 2];(Exhibit A [Declaration of Roger T. Nuttall, pages 1-5].) At present, however, Petitioner through her efforts of self-education, psychiatric treatment, devoted prayer, and the love and support of her new husband, has improved her mental condition enough to assist in her defense. This has only occurred since late 1997. (Exhibit C [Declaration of Dr. Miles Estner], and Exhibit A [Declaration of Roger T. Nuttall].) Since that period, habeas counsel had diligently and assiduously persisted in efforts to research the issues that have been brought up by Petitioner as she has been able to contribute.

Additionally, Petitioner had no reasonable knowledge of the unconsciousness defense which was unilaterally abandoned by defense counsel at trial. The defense was not discussed with her nor even asserted on appeal. Once this defense was discovered by

habeas counsel, habeas counsel assiduously pursued the defense by diligently securing and reviewing the pertinent medical and psychiatric records.

Further, similar to the *Saunders* case, the essential medical records pertaining to Petitioner's condition as relative to the unconsciousness defense, were only fully obtained in late August of 1998. (Exhibit C [Declaration of Dr. Miles Estner, page 3].) Hence, this 13-month period between when the essential medical records were obtained and when this petition was filed compares favorably with the period in *Saunders*.

Also, as in the *Saunders* case, Petitioner's medical file, because it contained only information from Dr. Boyd, Dr. Sheffner, and the prison doctors' findings regarding her mental condition, was incomplete and has only recently been completed by Dr. Estner's submission of his findings on October 5, 1998.

Thus, Petitioner argued that under *Saunders* there was substantial justification for any delay in this petition.

In contrast to *Saunders*, the California Supreme Court, in *People v. Jackson, supra*, 10 Cal. 3d 265, denied a petition as untimely where the defendant contended that he had been denied effective assistance of counsel at the guilt phase of his trial as a result of his attorney's failure to raise the defense of diminished capacity. There, (**a**) Jackson delayed 11 years before making his attack on that judgment and presented no justification for the delay; (**b**) the evidence on which he relied for collateral relief was largely a repetition of that presented in an early trial; and (**c**) defendant had not raised the issue in 3 prior appearances before the Court.

It is notable that during the pendency of all state habeas proceedings, the People neither argued that the Petitioner's request

was time-barred, nor did any of the reviewing courts hold that the Petitioner's state collateral proceedings were time-barred.

In federal habeas proceedings, the Petitioner concedes that the AEDPA applies to her filing.

Petitioner contends that the provisions of 28 U.S.C. 2254(d)(2) are sufficient to toll the statute of limitations provisions of the AEDPA during the pendency of state collateral proceedings. The People argue that Green v. White, 223 F.3d 1283, 1288-1289 (9th Cir. 1997) applies herein; however, Green concerned itself with a Petitioner, who had a previous federal habeas petition dismissed for failure to exhaust state remedies; then delayed filing a second petition until more than one year after the exhaustion of state collateral proceedings. Such is not the case herein.

Further, it is clear that the doctrine of "equitable tolling applies herein. The Petitioner had experienced serious mental problems for many years. This is uncontraverted. She has been subject to ritual sexual mutilation, ongoing and continuing sexual abuse since childhood, slavery, forced drug use, and prostitution.

The Ninth Circuit has addressed equitable tolling of the AEDPA's statute of limitation in two opinions - Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288-1289 (9th Cir. 1997); and Calderon v. United States (Kelly), 163 F.3d 531, 541, (9th Cir. 1998). In both cases the Court held that equitable tolling of the AEDPA's statute of limitations is permitted "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time". Calderon (Kelly) at 541, citing Alvarex-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996); cert. Denied, 118 .S.Ct. 60 (1997).

In Calderon (Kelly), the Court found that the petitioner's mental

incompetency - ".....a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control - rendered the petitioner unable to assist his attorney in the preparation of his petition, and therefore served to equitably toll the statute of limitations.....". The Court further found that when a putative habeas petitioner's mental incompetency is at issue, and the record discloses a genuine basis for concern, it was appropriate to toll the AEDPA's time bar.

It is clear from the medical records, and opinions of medical experts that the Petitioner was incompetent to assist in her own defense, assist counsel in the preparation of a writ of habeas corpus, much less understand and undertake the preparation for a Petition For A Writ Of Habeas Corpus until mid 1998 at the earliest. Thus, "equitable tolling" is appropriate until such time as the Petitioner became competent. And in fact, counsel believes that the Petitioner still exhibits periods and signs of mental incompetence. The Ninth Circuit Court of Appeals squarely addressed this issue recently in Crawford v. Oregon State Hospital, 36 Fed. Appx. 894; 2002 U.S. App. Lexis 5368 (9th Cir. 2002) holding that where a Petitioner made an adequate showing of mental incapacity, there is a duty by the district court to inquire as to whether such incapacity created grounds for equitable tolling. The Court stated the petitioner (Crawford) did not waive the issue by failing specifically to invoke the doctrine of equitable tolling in the district court, but that his response, and the record, disclosed a sufficient basis to question his mental state and required the district court to examine whether grounds existed for equitable tolling on that basis. In Crawford, the appellate court required that the district court inquire more fully into the petitioner's mental state before applying the time bar. See Crawford at 895.

Additionally, a Petitioner is entitled to statutory tolling for any

period of time during which a properly filed habeas petition is pending in state court. *28 U.S.C.S. § 2244(d)(2).*

Further, the Petitioner requests, as it did it its initial filing, that the Court take notice of Odle v. Woodford, 238 F.3d 1084 (9th cir. 2001); a case which has significantly parallels the circumstances in the instant matter. In Odle the appellate court held that the trial court's unreasonable failure to inquire whether the petitioner possessed the mental acuity to participate in the trial, violated the petitioner's right to due process. While Odele did not involve a AEDPA issue, it is clear from the record that this petitioner was mentally incompetent at the time of the trial; and that she remained so, at least through mid 1998; and in fact may very well still experience psychotic episodes.

CONCLUSION

The People's Motion To Dismiss, should be denied. The Petition was timely filed pursuant to 28 U.S.C. 2844 (d)(2). Further, if the Court should determine that the above is not correct; the Court should then permit equitable tolling of the AEDPA's statute of limitations. At a minimum, the district court should hold a hearing to determine if the Petitioner was mentally incompetent so as to justify equitable tolling.

This is a case which cries out for habeas relief in the interest of justice. A young girl, ritually mutilated, forced into sexual activities with family members, sold into slavery, forced into prostitution; abused at every turn; over whelming evidence of ineffective assistance of counsel; and documented evidence collusion between her trial counsel and the Court in her original conviction.

The Court is requested to order an evidentiary hearing as to this Petition.

DATED: April 18, 2003.

Respectfully Submitted,
NUTTALL BERMAN ATTORNEYS
"s/ROGER T. NUTTALL"
By: _____
ROGER T. NUTTALL
Attorneys for Petitioner
OMAIMA NELSON

EXHIBIT A

DECLARATION OF ROGER T. NUTTALL

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.)ss.
I, ROGER T. NUTTALL, declare that:

1. I am an attorney licensed to practice law in the State of California, and that I am the attorney of record for the Petitioner, Omaima Nelson, herein;

2. I was retained to represent Omaima Nelson in September of 1995, after the Supreme Court of California denied a hearing in this case, to look at the case in terms of a remedy for Nelson's conviction. For the remainder of the year 1995, I, together with a member of our support staff, reviewed the transcripts of the trial, which were lengthy, as well as the appellate briefs relative to the appeal of this case;

3. Initially, we began researching the remedies of Coram Nobis and Habeas Corpus. We also began researching certain aspects of the law as related to problems particularly related to our client, e.g. sexual mutilation as it related to her having been sexually mutilated as a child in Egypt and her subsequent physical and sexual abuse at the hands of her late husband;

4. I completed several interviews with Omaima during the latter part of 1995. These interviews were highlighted by the client's disorganized mental state and the attendant difficulties of dealing with her on a personal level as well as trying to ascertain her recollections of the trial and the facts of the case. Also, the client

lacked any significant legal knowledge;

5. Throughout this time period, we were actively trying to obtain mental health records from Orange County, as well as hospital records dealing with Omaima Nelson's mental state;

6. The review of the documentation that we had thus far received continued into the early part of 1996, and it was at that time that we began legal research regarding the issues that had been raised on appeal. Meanwhile, we continued to talk to experts concerning the genital and sexual mutilation issues, as well as review the medical records which we had thus far obtained. We further examined the appellate issues through a review of the trial transcripts and continued to seek records from the Orange County Superior Court. We received additional records from the Orange County Superior Court in late February, 1996;

7. At that time, we began to examine pretrial matters such as pretrial motions and matters attendant to that. We initially focused on the idea of re-litigating all the issues related to the possible plea of not guilty by reason of insanity, which we felt should have been assert d in this case. We further examined an insanity plea in relation to a Petition for a Writ of Habeas Corpus. All the while, we continued to visit periodically with the client to see if her mental state had improved enough to a point where she could be able to relate to us her recollection of the circumstances of the case and/or her recollection of the trial.

8. While I felt that she was getting better during early 1996, there were certain difficulties still present that we were simply unable to be overcome in terms of being able to communicate with her;

9. By the Summer of 1996, we had discerned what issues

needed to be developed; namely, the insanity issue, the delay of the jury deliberations, as well as the competency of counsel issues. Pursuant to this end, we telephoned Mr. Thomas Mooney at the public defender's office in Orange County to obtain his file. We were, at that time, particularly interested in what type of medical and psychiatric records Mr. Mooney had;

10. In October of 1996, I traveled to Orange County to meet with Mr. Mooney and to consult with him, as well as with Dr. Nancy Kaser-Boyd in order to ascertain her thoughts on the mental issues involved in this case. I also met with Dr. Teresa Farjalla who had been a treating doctor while Omaima Nelson was in custody, awaiting and during trial;

11. During my meeting with Mr. Mooney, I requested that he immediately forward the psychiatric and medical records. He represented that he would send me all pertinent records regarding Omaima Nelson's case such that I relied on his assurances;

12. In a subsequent meeting with Omaima Nelson, I was able to gather enough information which allowed me to contrast what she was able to remember, and not remember, with the trial transcript. This, coupled with my discussions with Dr. Kaser-Boyd, convinced me that the most significant issue in the case was the failure to assert the insanity defense. At that time, I questioned (in my own mind) whether an unconsciousness instruction had been given, but I did not delve into that further at that time;

13. In October, 1996, we wrote again to Mooney requesting the client's medical and psychiatric records, as well as support for any waiver of the insanity defense. We also began to re-examine the transcript in light of the issues that we had developed at that time. Additionally, we began speaking with the appellate attorney

concerning certain appellate materials, and inquiring as to what other issues he thought may be available;

14. In December of 1996, we again wrote to Mr. Mooney specifically reminding him, for the second time, in as many letters, that we needed Omaima Nelson's medical, psychological and psychiatric reports, together with any records of her waiver of the insanity defense;

15. In approximately late 1996, Omaima Nelson began to become somewhat more lucid; and during my meetings with her, we were able to talk somewhat more about her recollection of whether or not she waived the insanity defense and what she remembered of the circumstances of that waiver;

16. It became clearer and clearer to me that Omaima Nelson was, during the trial of her case, effectively "excluded" from what was transpiring in the most important matters of the trial, and that matters were being handled on her behalf, without her approval and in her absence, or both;

17. During the early part of 1997, we continued to work on the preparation of the petition for Writ of Habeas Corpus, but by May of 1997, we still had not received the medical, psychological, or psychiatric records and reports which we had requested, nor had we received information relative to the purported waiver of the insanity defense;

18. In July of 1997, we did finally receive those materials, and we commenced conducting a review of those records;

19. Following a review of those materials, we discovered that there were additional failures on the part of counsel to pursue two very important issues; namely, the issues of unconsciousness and incompetency to stand trial. Through further review, we also

discovered that the unconsciousness jury instruction had apparently been withdrawn by counsel during the trial. We then began researching the law regarding unconsciousness and came t:o believe that it was a very appropriate issue based upon the facts of the trial as derived from the trial transcripts. Also, in approximately September, 1997, based upon what I was learning from the client from my discussions with her, (she was continuing to become much more lucid), we began considering the fact that Omaima Nelson had most, likely been incompetent to stand trial at the time of trial and had really not known what was occurring at that time;

20. Subsequently, I again flew to Los Angeles and met with Dr. Nancy Kaser-Boyd wherein I discussed with her both the insanity and unconsciousness defenses. She affirmed to me that indeed both were, in her opinion, viable defenses;

21. In October of 1997, we sent Dr. Kaser-Boyd relevant reports and again pursued the purported waiver of the insanity defense by writing a fifth letter to Mr. Mooney requesting the waiver, as well as any other materials that he had concerning evaluations of Omaima Nelson by Dr. Nancy Kaser-Boyd from the time of the trial;

22. Thereafter, we received what may have been the purported waiver of Omaima Nelson's insanity defense, which was, in fact, merely a waiver of her right to be present;

23. At that same time, we came to the realization that the truly most significant issue in the case was the issue of unconsciousness, in addition to the insanity issue, and we began doing significant work on the unconsciousness issue. Towards this end, in early 1998, we were able to retain Dr. Miles Estner, a

medical doctor and a psychiatrist, to review the entire case including all of the records in order to advise us on the viability of the unconsciousness and insanity defenses;

24. Continuing in 1998, Dr. Estner proceeded to review all of the records that we had thus far acquired. He felt that he needed to see Omaima Nelson's prison medical file, as well as, visit her in prison. After having some difficulty in arranging meetings with her, Dr. Estner ultimately came to the conclusion, during the mid part of the year 1998 that, more important than the failure to assert the insanity defense, was the failure to assert the unconsciousness defense because it was particularly viable. Dr. Estner also concluded that, perhaps equally as important as the unconsciousness defense, was the failure to request, on the part of counsel, and the failure to conduct, on the part of the court, a Penal Code Section 1368 competency hearing. In Dr. Estner's opinion, Omaima Nelson was, at the time of the trial, both mentally and physically incompetent to stand trial;

25. Since the latter part of 1998, our office has been trying to perfect our entire Petition for Writ of Habeas Corpus. This process has included a review of the entire case file and a thorough examination of all possible relevant legal issues in order that the Petition be ultimately complete and adequate. In this regard, we have explored additional issues, including, but not limited to, cultural defenses, the possible error with reference to not providing Omaima Nelson with a court certified interpreter, but these, among other issues, have been discarded;

26. In general, this project has been a mammoth undertaking and has been a project wherein a tremendous amount of time and resources have been devoted in order that justice may ultimately

be served in this case. Notwithstanding other significant commitments on the part of our small office to matters of significant and complex litigation, we have pursued our investigation and preparation of the instant Petition with as much reasonable diligence as could be done within the normal constraints of a practicing law office. Because of the enormity of what was required by this project, there were times when we could not match the resources that seemed to be required. However, we have, through continuous, diligent, and even tenacious efforts, been able to finish this Petition and bring to light certain errors and injustices which have unfortunately been allowed to stand;

27. It should be emphasized that since middle to late 1998, following our conclusion, based upon our review of the complete file, as well as our review of Dr. Estner's analysis of the complete file, that the most viable aspects of the case deal with Omaima Nelson's unconsciousness defense, as well as her incompetency to stand trial, and we have since directed our efforts assiduously toward those issues;

28. Attached hereto as Exhibit "B" and incorporated herein by reference, is a true and correct copy of the Declaration of Omaima Nelson;

29. Attached hereto as Exhibit "C" and incorporated herein by reference, is a true and correct copy of the Declaration of Dr. Miles Estner;

30. Attached hereto as Exhibit "D" and incorporated herein by reference, is a true and correct copy of the Declaration of Dr. Nancy Kaser-Boyd;

31. Attached hereto as Exhibit "E" and incorporated herein by

reference, is a true and correct copy of each cited portion of the Clerk's Transcript, in the order in which each is cited to in this Petition for Writ of Habeas Corpus;

33. Attached hereto as Exhibit "F" and incorporated herein by reference, is a true and correct copy of each cited portion of the Reporter's Transcript, in the order in which each is cited to in this Petition for Writ of Habeas Corpus;

34. Attached hereto as Exhibit "G" and incorporated herein by reference, is a true and correct copy of the Reporter's Sealed Transcript of the December 17, 1992 In Camera Proceeding, cited to several times in this Petition for Writ of Habeas Corpus;

35. Attached hereto as Exhibit "H" and incorporated herein by reference, is a true and correct copy the cited portion of the Reporter's Transcript Jury Voir Dire, cited to several times in this Petition for Writ of Habeas Corpus;

36. Attached hereto as Exhibit "I" and incorporated herein by reference, is a true and correct copy of records from the Superior Court of California, County of San Bernadino, cited to in this Petition for Writ of Habeas Corpus;

37. Attached hereto as Exhibit "J" and incorporated herein by reference, is a true and correct copy of each cited portion of the Appellant's Opening Brief On Appeal, in the order in which each is cited to in this petition for Writ of Habeas Corpus;

38. Attached hereto as Exhibit "K" and incorporated herein by reference, is a true and correct copy of Appellant's Petition For Review to the California Supreme Court and the Order of the California Supreme Court, cited to in this petition for Writ of Habeas Corpus;

39. Attached hereto as Exhibit "L" and incorporated herein by

reference, is a true and correct copy of a Memorandum, dated October 23, 1996, which I personally dictated to the case file, and which is cited to in this Petition for Writ of Habeas Corpus;

40. Attached hereto as Exhibit "M" and incorporated herein by reference, is a true and correct copy of a Memorandum, dated October 29, 1996, which I personally dictated to my secretary Rose, and which is cited to in this Petition for Writ of Habeas Corpus;

41. Attached hereto as Exhibit "N" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk Steven Bolm to Public Defender Tom Mooney, dated October 29, 1996 and which is cited to in this petition for Writ of Habeas Corpus;

42. Attached hereto as Exhibit "0" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk, Steven Bolm, to Public Defender Tom Mooney, dated December 26, 1996 and which is cited to in this Petition for Writ of Habeas Corpus;

43. Attached hereto as Exhibit "P" and incorporated herein by reference, is a true and correct copy of a letter written by me to Public Defender Tom Mooney, dated May 29, 1997 and which is cited to in this Petition for Writ of Habeas Corpus;

44. Attached hereto as Exhibit "R" and incorporated herein by reference, is a true and correct copy of Documentation regarding Dr. Miles Estner's visitation with Petitioner, referenced to in this petition for Writ of Habeas Corpus;

45. Attached hereto as Exhibit "S": and incorporated hereinby reference, is a true and correct copy of the Appellate Court Opinion, cited in this Petition for Writ of Habeas Corpus;

46. Attached hereto as Exhibit "T" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk, Steven Bolm, to Public Defender Tom Mooney, dated August 22, 1997 and which is cited to in this petition for Writ of Habeas Corpus;

47. Attached hereto as Exhibit "U" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk, Steven Bolm, to Public Defender Tom Mooney, dated October 28, 1997 and which is cited to in this Petition for Writ of Habeas Corpus;

48. Attached hereto as Exhibit "V" and incorporated herein by reference, is a true and correct copy if the Waiver of Defendant's Personal Presence, signed by petitioner and dated December 17, 1992, and which is cited to in this petition for Writ of Habeas Corpus;

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, except as to those matters stated on information and belief, which we believe to be true, and that this Declaration was executed on September 21,1999, at Fresno, California.

"S/ROGER T NUTTALL"
ROGER T NUTTALL

EXHIBIT B

DECLARATION OF OMAIMA NELSON

STATE OF CALIFORNIA,)
COUNTY OF MADERA.) ss.

I, OMAIMA NELSON, declare that:

1. I was the defendant in a criminal trial in the Orange County Superior Court wherein I was convicted of Second Degree Murder in 1993;

2. Basically, I still do not feel that I understand what actually happened in terms of the facts of the case giving rise to the prosecution;

3. I still do not feel that I really understood what was going on in terms of the trial itself;

4. I now believe that I suffered from a mental illness at the time of the events concerning the facts of the case and at the time of the trial, but at that time, I did not know whether the issue of my mental illness had been addressed by the court or by my lawyer, Mr. Mooney;

5. At some point, my attorney, Mr. Mooney, discussed with me my "sanity" and said something to me about my being insane after the killing, but not at the time of the killing;

6. I did not know at the time of the trial anything about my attorney asserting an "unconsciousness" defense, nor did I know that there was available to me a defense based upon unconsciousness;

7. I did not know that Dr. Nancy Kaser-Boyd recommended or wanted my attorney to assert the "unconsciousness" defense;

8. My attorney, Mr. Mooney, never discussed the "unconsciousness" defense with me;

9. I did not know that my attorney had originally submitted a jury instruction based upon "unconsciousness" and that he, thereafter, withdrew said proposed jury instruction;

10. As I best recall, the first time that I was aware of the possibility of a defense based upon "unconsciousness" was when I spoke with Attorney ROGER NUTTALL, about the question of unconsciousness during the latter part of the year 1997, or early part of the year 1998;

11. My attorney, Mr. Mooney, exercised his control only over the decision to assert a defense based upon insanity;

12. I did not know about the "in chambers" meeting respecting the assertion of not guilty by reason of insanity plea; I did not waive my right to be present (in said "in chambers" meeting;

13. The only thing that I remember concerning the assertion of the not guilty by reason of insanity plea was that I was told by my attorney that if the jury found that I was insane, I would spend the rest of my life in confinement in a mental institution;

14. My attorney, Mr. Mooney, exercised his control only, over the decision to allow a delay following closing arguments at the Superior court trial before jury instructions were given. To my knowledge, he did not object. I have questioned him as to why there would be such a delay, and he stated that the decision had already been made.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this

Declaration was executed on May 2, 1999, at Chowchilla, California.

Signed: "s/Omaima Nelson"
Omaima Nelson

EXHIBIT C
DECLARATION OF DR. MILES ESTNER

(see H4 - not reprinted here)

EXHIBIT D

DECLARATION OF NANCY KASER-BOYD, Ph.D.

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.) ss.

I, NANCY KASER-BOYD, declare that:

1. I am a clinical and forensic psychologist properly practicing in the State of California

2. I examined Omaima Nelson seven times, over 25 hours while she was in jail awaiting trial. I also reviewed all of the evaluation materials following Omaima's trial for the purposes of developing and publishing a law review article on the legal relevance of Post-Traumatic Stress Disorders;

3. In my opinion, based upon a thorough psychological examination of Omaima, Omaima was deeply psychotic, not only at the time of the incident, but most likely for at least several weeks following the incident. Her formal diagnosis was Post-Traumatic Stress Disorder Complex, and I believe that she was in a Reactive Dissociative State at the time of the homicide and dismemberment of the body of her husband;

4. I believe that the Reactive Dissociative State was triggered by a 'threatening' situation which included substantial verbal abuse, threats to harm her, cuts inflicted on her body, and intense vaginal pain caused by the effect of forced sexual assault on her already fragile circumcized genital area.

5. The bulk of my work with Mr. Mooney went toward developing the unconsciousness defense, however, my diagnosis

of Omaima also supports the insanity defense and imperfect self-defense.

6. It was never my opinion that the defense of not guilty by reason of insanity was inappropriate or inapplicable in this case. I never advised Mr. Mooney that he should not use this defense. It is my memory that he was concerned that the outcome of the insanity defense is often. lifelong placement in a psychiatric facility.

7. Likewise, it was never my opinion that the defense of unconsciousness was inappropriate or inapplicable in this case. I never advised Mr. Mooney that he should not use this defense. My recollection is that a substantial part of my trial testimony explained dissociation and how this makes a person psychologically "unconscious".

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this Declaration was executed on August 13, 1999, at Studio City, California.

Signed, "s/Nancy Kaser-Boyd, Ph.D."
Nancy Kaser-Boyd, Ph.D.